

Missouri Attorney General's Opinions - 1978

Opinion	Date	Topic	Summary
2-78	Apr 14	SCHOOLS. TEACHERS.	1. A school district which terminates a teacher's employment may also subsequently prefer charges to revoke the teacher's certificate, assuming that sufficient statutory grounds exist for both actions. 2. A school district may prefer charges to revoke a teacher's certificate based on conduct which occurred while the teacher was previously employed by another district.
7-78			Withdrawn
10-78			Withdrawn
15-78	Apr 13	AGRICULTURE.	The provisions of Section 411.150, RSMo 1969, allow the director of the Department of Agriculture to set fees for grain inspection and sampling services either on a uniform basis throughout the state or on a separate basis at each grain inspection location, based on the administrative expenses at that location, so long as the revenues produced from the fees meet the costs and expenses of administering Chapter 411.
19-78	Aug 18	NURSES.	A physician who is located in a state bordering Missouri who meets the requirements of Section 334.150, RSMo, and is authorized to treat patients in Missouri may utilize the services of licensed practical nurses and registered nurses as provided in Section 335.016, RSMo Supp. 1976.
21-78	Jan 30		Opinion letter to The Honorable George P. Dames
22-78	Jan 23		Opinion letter to Mr. Carl R. Noren
23-78	Jan 30	STATE AUDITOR. REAL ESTATE COMMISSION.	The Missouri Real Estate Commission improperly issued broker's licenses in 1973 and 1974 to persons without requiring them to successfully pass the real estate broker's examination.
24-78			Withdrawn
25-78	May 2	SCHOOLS. TEACHERS. SCHOOL DISTRICTS.	The amendments to the contract between Parkway School District and its superintendent, Wayne W. Fick, increasing his salary are unenforceable, void, and violate Article III, Section 39 (3), Constitution of Missouri, and Section 432.070, RSMo 1969.
26-78	Jan 26		Opinion letter to Mr. Joe G. Harms, II
29-78	Jan 11		Opinion letter to The Honorable Emory Melton
30-78	Jan 27	ELECTIONS.	Section 17 of Article IV of the Missouri Constitution, limiting the

		CANDIDATES. GOVERNOR.	number of times a person may be elected to the office of governor, is applicable to the person who held the office because of election to such office when such section became effective.
31-78	Apr 19	BARBERS. LICENSES. COSMETOLOGY.	Barbers and cosmetologists may work in the same physical area if such area is licensed as a cosmetology shop and is subject to inspection by both the State Board of Cosmetology and State Board of Barber Examiners.
32-78	Oct 19		Opinion letter to The Honorable Warren Welliver
33-78	Apr 20	STATE TAX COMMISSION.	The State Tax Commission has the statutory authority to appoint hearing examiners for conducting initial investigations and making advisory recommendations in appeals taken under Section 138.430(2), RSMo 1969.
34-78	Apr 18		Opinion letter to The Honorable Hardin C. Cox
35-78	May 23	PLANNING AND ZONING. COUNTY PLANNING AND ZONING.	The platting and recording of a subdivision is not sufficient use and maintenance of existing property so as to exempt it from changes in county requirements, <u>§§ 64.850-64.895</u> , RSMo.
36-78	Jan 10		Opinion letter to Mr. Stephen C. Bradford
37-78	Jan 10		Opinion letter to Mrs. Carolyn Ashford
39-78	July 19		Opinion letter to Mr. Jack M. Keene
40-78	Jan 19	PROSECUTING ATTORNEY. CRIMINAL PROCEDURE. CRIMINAL LAW.	The county prosecuting attorneys are authorized under the law of this state to exercise discretion in determining whether or not to prosecute on the basis of a criminal complaint, so long as such discretion is exercised fairly, in good faith and in accordance with established principles of law.
41-78	Jan 30	GOVERNOR. PARDONS.	The Governor of the State of Missouri may partially pardon an offender so that the recipient will remain subject to the second offender provisions contained in Section 556.280, RSMo.
43-78	Dec 14	SCHOOLS. SCHOOL DISTRICTS.	(1) Neither a school district nor the State Department of Elementary and Secondary Education may deny access to the educational records of a handicapped or severely handicapped child by a validly authorized representative of the child's parent or guardian. (2) This office will not render an opinion on the question of unauthorized practice of law, deferring to the Missouri Bar Advisory Committee.
44-78	Aug 2		Opinion letter to The Honorable Larry M. Burditt
46-78	Mar 13		Opinion letter to The Honorable Douglas Boschert
47-78	June		Opinion letter to The Honorable Thomas M. Keyes

	23		
49-78	Mar 23		Opinion letter to The Honorable Kaye Steinmetz
50-78	Mar 15		Opinion letter to The Honorable Harold F. Reisch
52-78	Apr 20		Opinion letter to The Honorable Richard C. Hamilton
55-78	Aug 4	COUNTIES. COUNTY COURTHOUSE. RECORDER OF DEEDS.	Although an abstract business cannot generally lease space in a county courthouse for abstract business such business has the right to inspect and copy records in the office of the recorder of deeds or in a space close thereto under the supervision of the recorder of deeds and upon payment of charges fixed by the county court for the use of space and supervisory personnel upon the same terms afforded the public generally. There is no authority for an abstract company or any private individual to use county equipment for such copying.
57-78	Apr 21		Opinion letter to The Honorable George E. Murray
59-78	July 11		Opinion letter to The Honorable Harry Hill
60-78			Withdrawn
62-78	Mar 17		Opinion letter to Dr. James Frank
66-78			Withdrawn
67-78	Oct 24		Opinion letter to The Honorable Al Nilges
68-78	June 22		Opinion letter to The Honorable Richard J. DeCoster
70-78	Feb 28		Opinion letter to Mr. Patrick Cronan
71-78	May 26		Opinion letter to The Honorable John Buechner
72-78	Feb 28		Opinion letter to The Honorable Gerry Durnell
73-78	May 3		Opinion letter to The Honorable Marvin Proffer
74-78	Feb 27		Opinion letter to The Honorable Thomas M. Keyes
76-78	Mar 6		Opinion letter to The Honorable J. B. Banks
77-78			Withdrawn
78-78	Mar 15		Opinion letter to The Honorable Carrol J. McCubbin
82-78	Apr 25		Opinion letter to The Honorable Bradshaw Smith
84-78	Mar 28	ELECTIONS. CITY ELECTIONS.	When a school district holds a regular election on the first Tuesday of April, 1978, and the City of Springfield, a constitutional charter city, submits a special question at such election the costs of the election are to be paid pursuant to Section 115.067, (Section 2.520 of SSHB No.

			101, First Regular Session, 79th General Assembly), of the Comprehensive Election Act of 1977.
85-78			Withdrawn
86-78	Mar 22		Opinion letter to The Honorable Sam Doult
88-78	Aug 24		Opinion letter to The Honorable Charles H. Baker
89-78	Mar 15		Opinion letter to The Honorable Robert Fowler
91-78	Sept 26	DEPARTMENT OF MENTAL HEALTH. STATE FUNDS.	<p>1. Revenue generated by activities of facilities of the Department of Mental Health, such as the operation of commissaries, canteens, and work activity centers, should be deposited into the state treasury and credited to the general revenue fund.</p> <p>2. The expenditure of money received from such activities should be controlled by the legislature through the appropriations process.</p> <p>3. Subject to the direction of the director of the Department of Mental Health, a superintendent of a mental health facility may permit a not-for-profit corporation to operate a commissary or cafeteria on the premises for the benefit of the facility patients.</p>
92-78	June 22		Opinion letter to Mr. William Kenneth Carnes (addendum to Opinion No 299-1973)
93-78	July 24	COUNTIES. JUVENILES. COUNTY COURT. COUNTY BUILDINGS.	The County Court of St. Charles County acting for the county of St Charles, Missouri may under the applicable Missouri statute purchase a preexisting building for utilization as a juvenile detention facility and that said building to be purchased may be located outside the city limits of the county seat of St. Charles County.
94-78	Apr 17	TAXATION (CITY SALES TAX). BALLOTS. ELECTIONS. CITY ELECTIONS.	Section 8.120 of the Comprehensive Election Act of 1977 (SSHB No . 101 , First Regular Session , 79th General Assembly) provides for the form of the ballot submission with respect to city sales tax elections notwithstanding the provisions of Section 94.510, RSMo, as amended in 1977.
95-78	Apr 3		Opinion letter to The Honorable Ralph Uthlaut, Jr
97-78	June 8	SCHOOLS. DRIVER'S EDUCATION.	A school district may not grant credit for courses for which a fee is paid to a not-for-profit corporation established to provide courses which the district itself cannot or does not provide.
98-78	Apr 27	COUNTY SCHOOL BOARDS. SCHOOLS.	Subsection 3 of Section 162.111, RSMo, governs with respect to the costs of an election of the members of the county board of education.

99-78	Apr 13	ELECTIONS. SCHOOL ELECTIONS.	Subsection 3 of Section 115.517 of the Comprehensive Election Act of 1977, which requires a special election in case of a tie vote, is applicable to annual school elections at which directors are elected.
100-78			Withdrawn
104-78	Sept 27		Opinion letter to The Honorable Marion Cairns
105-78	Oct 12		Opinion letter to The Honorable Ronald L. Boggs
106-78	June 22		Opinion letter to C. Duane Hensley, Ph.D.
107-78	June 22		Opinion letter to The Honorable Mark T. Kempton
108-78	Apr 28		Opinion letter to Dr. Arthur L. Mallory
109-78	June 22		Opinion letter to Dr. Arthur L. Mallory
110-78	Sept 26		Opinion letter to The Honorable Glenn Binger
111-78	Apr 28		Opinion letter to The Honorable Milt Harper
114-78	May 9		Opinion letter to The Honorable Carl H. Muckler
116-78	June 23		Opinion letter to The Honorable Robert L. Cox
117-78	May 23		Opinion letter to The Honorable James F. McHenry
119-78	June 1		Opinion letter to The Honorable Milt Harper
120-78	July 12		Opinion letter to Mr. Robert S. Townsend
121-78	Sept 26		Opinion letter to The Honorable George K. Hoblitzelle
122-78	Oct 17		Opinion letter to The Honorable Timothy J. Patterson
124-78	June 22		Opinion letter to Dr. Arthur L. Mallory
126-78	Oct 19	REAL ESTATE BOARD. REAL ESTATE COMMISSION.	The use of a guaranteed home purchase program as an inducement to obtain customers is a violation of Section 339.100(12), Senate Bill No. 811, 79th General Assembly, Second Regular Session.
128-78	June 9		Opinion letter to The Honorable James C. Kirkpatrick
129-78	June 22		Opinion letter to Dr. Arthur L. Mallory
130-78	June 22		Opinion letter to Dr. Arthur L. Mallory

131-78	June 23		Opinion letter to The Honorable George P. Dames
133-78			Withdrawn
134-78	Aug 18	SCHOOLS. PUBLIC SCHOOL RETIREMENT SYSTEM. TEACHERS.	Senate Bill No. 906 of the Second Regular Session, 79th General Assembly, effective August 13, 1978, relating to membership and prior service credit in the Public School Retirement System of Missouri does not authorize a reapplication for election by a member of the system to pay previous withdrawals or refunds to reinstate prior service credit.
135-78	July 5		Opinion letter to Dr. Arthur L. Mallory
136-78	July 21	ESCHEATS. BANKS. CREDIT UNIONS.	Notices which are required to be mailed by financial institutions under S.C.S.H.C.S.H.B. 896 & 897, Second Regular Session, 79th General Assembly, effective August 13, 1978, relating to unclaimed property, should be mailed promptly after August 13, 1978, and, thereafter, on or before the first day of August as provided in such act.
139-78	July 21		Opinion letter to The Honorable Thomas A. Villa
140-78			Withdrawn
141-78	Sept 27		Opinion letter to Dr. William R. Goodge
143-78	July 25		Opinion letter to The Honorable Meredith Ratcliff
144-78	Sept 7	CITIES, TOWNS & VILLAGES. CHARTER CITIES. AMBULANCES.	Ambulances owned and operated by a constitutional charter city and licensed by the state under <u>§§ 190.100-190.190</u> , RSMo Supp. 1975, must be insured as required by <u>§ 190.120</u> , RSMo Supp. 1975 and <u>13 CSR 50-40.030</u> and the city may not self-insure to meet this requirement.
146-78	July 31		Opinion letter to The Honorable John G. Meyer
150-78	Sept 6		Opinion letter to The Honorable John E. Casey
152-78	Sept 11		Opinion letter to Mrs. Carolyn Ashford
153-78			Withdrawn
154-78			Withdrawn
155-78	Aug 29		Opinion letter to The Honorable Stan Thomas
156-78	Oct 19	INSURANCE.	A medical malpractice assessment association under Chapter 383, V.A.M.S., is required to become a member of the Missouri Insurance Guaranty Association and to pay premiums and assessment to such association as required by law.
159-78	Sept 5		Opinion letter to The Honorable James C. Kirkpatrick
161-78	Oct 17		Opinion letter to The Honorable Michael J. Lybyer

162-78	Sept 13		Opinion letter to The Honorable James C. Kirkpatrick
166-78	Oct 13		Opinion letter to Mr. Gerald H. Goldberg
167-78			Withdrawn
168-78			Withdrawn
169-78			Withdrawn
170-78	Oct 12		Opinion letter to The Honorable James Russell
171-78	Oct 2	COUNTIES. COUNTY PURCHASES. COUNTY CONTRACTS. COUNTY PROPERTY. PUBLIC NOTICES.	A third class county which wishes to repair and remodel a recently purchased building for use as additional office space for county officials must comply with the provisions of Section 50.660, RSMo.
174-78	Nov 30		Opinion letter to The Honorable Theodore L. Johnson III
178-78	Dec 8	MENTAL HEALTH. MUNICIPAL COURTS.	The municipal courts of Missouri do not have jurisdiction to commit individuals to facilities of the Department of Mental Health for evaluation or treatment pursuant to Sections 552.020 or 552.040, RSMo.
179-78	Oct 3	ELECTIONS. CORRUPT PRACTICES.	A corporation, labor union or other organization which only makes campaign contributions or expenditures in excess of \$500 <u>from its own funds or property</u> is not a "committee" for purposes of the campaign financing act and is therefore not required to meet with the organizational and reporting requirements of committees under §§ 130.021, 130.036 and 130.041, V.A.M.S.
180-78	Dec 29	ELECTIONS. NURSING HOME DISTRICTS. STATUTORY CONSTRUCTION.	Each voter in a nursing home district election shall vote for the director from his district as provided in House Bill 1208, Second Regular Session, 79th General Assembly, and not for all six directors, as provided in House Bill 971, Second Regular Session, 79th General Assembly. Such bills should be merged to give effect to new provisions and the provisions of such bills which are reenactments which conflict with new matter will give way to such new matter. Where the legislature has deleted old provisions in one bill but has not done so in the other bill, such deletions should be given effect.
187-78	Oct 20		Opinion letter to Mr. Stephen C. Bradford
189-78	Nov 13		Opinion letter to The Honorable C. E. Hamilton, Jr.
193-78	Nov 17		Opinion letter to The Honorable John A. Parks
194-78	Dec 29	PROSECUTING ATTORNEYS. FEES,	With respect to the amendments made to Section 56.310, RSMo 1969, by House Bill No. 1052 and House Bill No. 1634, both enacted by the 79th General Assembly, Second Regular Session, that the prosecuting

		COMPENSATION AND SALARIES. STATUTORY CONSTRUCTION.	attorney fees provided for in House Bill No. 1052 remain in effect after January 2, 1979.
198-78	Dec 12		Opinion letter to The Honorable James F. McHenry
200-78	Nov 22		Opinion letter to The Honorable Robert L. Dunning
201-78	Apr 11		Opinion letter to The Honorable Kenneth J. Rothman
203-78	Dec 20		Opinion letter to The Honorable Michael J. Lybyer

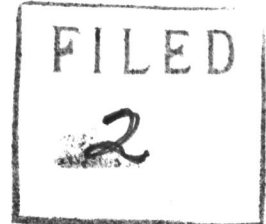
SCHOOLS:
TEACHERS:

1. A school district which terminates a teacher's employment may also subsequently prefer charges to revoke the teacher's certificate, assuming that sufficient statutory grounds exist for both actions. 2. A school district may prefer charges to revoke a teacher's certificate based on conduct which occurred while the teacher was previously employed by another district.

OPINION NO. 2

April 14, 1978

Dr. Arthur L. Mallory
Commissioner, Department of
Elementary & Secondary Education
P. O. Box 480
Jefferson City, Missouri 65101



Dear Dr. Mallory:

This official opinion is issued in response to your request for rulings on the following questions:

"(1) If a public school teacher has been terminated by his employing board upon grounds that include reasons for which the teacher's certificate may be revoked, may that board of education subsequently prefer charges against the teacher to have his certificate of license to teach revoked?

"(2) If a board which terminated a teacher may not prefer charges against the teacher to have his certificate of license to teach revoked, who may?

"(3) If a teacher was terminated by a former employing board of education in Missouri for causes which could constitute grounds for revocation and later employed to teach in another Missouri school district, may the current employing board, upon learning about the reasons for previous termination, file charges against the teacher with the certificating agency based on the teacher's past conduct?"

Dr. Arthur L. Mallory

Section 168.011, RSMo 1969, provides that "No person shall be employed to teach in any position in a public school until he has received a valid certificate of license entitling him to teach in that position."

Section 168.021-1, RSMo Supp. 1975, describes the manner in which certificates are granted:

"1. Certificates of license to teach in the public schools of the state shall be granted as follows:

(1) By the state board of education, under rules and regulations prescribed by it,

(a) Upon the basis of college credit;

(b) Upon the basis of examination;

(c) To each student completing in a satisfactory manner at least a two-year course in a city training school as provided for in section 178.410, RSMo;

(2) By the Missouri state colleges and state universities, state teachers' colleges, the university of Missouri and Lincoln university to graduates receiving the degree of bachelor of science in education, a life teaching certificate bearing the signature of the commissioner of education and which shall be registered in the state department of elementary and secondary education."

In addition Section 168.031, RSMo 1969, requires that no person shall receive or hold a certificate who does not present evidence of good moral character.

The manner in which certificates may be revoked is described in Section 168.071, RSMo Supp. 1975, as follows:

"A certificate of license to teach may be revoked by the authority which issued the certificate upon satisfactory proof of incompetency, cruelty, immorality, drunkenness, neglect of duty, or the annulling of a written contract with the local board of education without the

Dr. Arthur L. Mallory

consent of the majority of the members of the board which is a party to the contract. All charges must be preferred in writing. They shall be signed by the chief administrative officer of the district or by the president of the board when so authorized by a majority of the board. The charges must be sworn to by the party or parties making the accusation, and filed with the respective certificating authority. The teacher must be given due notice of not less than ten days, and an opportunity to be heard, together with witnesses. The complaint must plainly and fully specify what incompetency, immorality, neglect of duty or other charges are made against the teacher, and if after a hearing the certificate is revoked, the teacher may appeal to the circuit court at any time within ten days thereafter by filing an affidavit and giving bond as is now required before magistrates. On appeal the judge of the circuit court shall, with or without a jury at the option either of the teacher or the person making the complaint, try the matter de novo, affirming or denying the action of the certificating authority, and shall tax the cost against the appellant if the judgment of the certificating authority is affirmed. If the court disaffirms the judgment, then it shall assess the costs of the whole proceedings against the district making the complaint."

Your first question asks whether a school board which has terminated a teacher's employment may subsequently prefer charges against the teacher to have his certificate revoked where the reasons for the teacher's discharge include grounds for revocation. No language in Section 168.071 explicitly requires that the district making complaint for revocation simultaneously be an employer of the teacher. It is to be noted, for example, that one of the grounds for revocation of a teacher's certificate is the "annulling" of a written contract with the local board of education without the consent of the majority of the members of the board which is a party to the contract. Should a teacher wrongfully terminate his contract, no employer-employee relationship would exist between the teacher and the local board. Nonetheless, the statute clearly contemplates that a district could seek to have a teacher's certificate revoked under such circumstances by preferring charges on those grounds.

Dr. Arthur L. Mallory

We note also that Sections 168.102 to 168.291 prescribe in detail the manner and grounds for which a teacher may be terminated from his employment. A school district clearly has authority both to terminate a teacher and to prefer charges for the revocation of the teacher's certificate, assuming that sufficient grounds exist for both actions. There is no language in any of the statutes indicating that these two courses of action are mutually exclusive or that one must precede the other. It is therefore our opinion that a school board which terminates a teacher's employment may also subsequently prefer charges to revoke the teacher's certificate. In view of this ruling, it is unnecessary to rule upon your second question.

Your third question asks if a school district may prefer charges against a teacher based on conduct precipitating termination in another district constituting grounds for revocation of the teacher's certificate. The example you provide is as follows:

"An employing board may be unaware of a teacher's past conduct until after the teacher is employed. For example: A teacher may have been terminated in one district for immoral conduct and then employed to teach in another school district. After the contract has been let, the employing board discovers the reasons for which the teacher had been terminated."

We find no language in the statute speaking directly to this point. However, Section 168.071, RSMo Supp. 1975, does require that:

". . . All charges must be preferred in writing. They shall be signed by the chief administrative officer of the district or by the president of the board when so authorized by a majority of the board. The charges must be sworn to by the party or parties making the accusation, and filed with the respective certificating authority. . . ."

Because nothing in the statute expressly prohibits it, we conclude that the new board may prefer charges against a teacher for conduct occurring while the teacher was employed by a former board. It should be noted, however, that all the requirements set forth in Section 168.071 concerning proper signatures, authorization by the board and the making of accusations under oath must still be adhered to. So long as these requirements are met, there is no legal impediment to the new board's preferring the charges.

Dr. Arthur L. Mallory

CONCLUSION

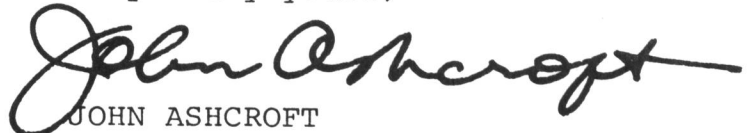
It is the opinion of this office that:

1. A school district which terminates a teacher's employment may also subsequently prefer charges to revoke the teacher's certificate, assuming that sufficient statutory grounds exist for both actions.

2. A school district may prefer charges to revoke a teacher's certificate based on conduct which occurred while the teacher was previously employed by another district.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Sheila Hyatt.

Very truly yours,


JOHN ASHCROFT
Attorney General

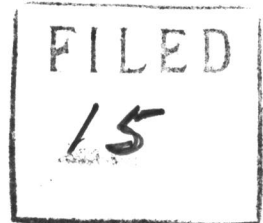
AGRICULTURE:

The provisions of Section 411.150, RSMo 1969, allow the director of the Department of Agriculture to set fees for grain inspection and sampling services either on a uniform basis throughout the state or on a separate basis at each grain inspection location, based on the administrative expenses at that location, so long as the revenues produced from the fees meet the costs and expenses of administering Chapter 411.

OPINION NO. 15

April 13, 1978

Jack Runyan, Director
Department of Agriculture
1300 Jefferson Building
Jefferson City, Missouri 65101



Dear Mr. Runyan:

This is in response to your recent opinion request which states:

"I request your legal opinion pertaining to whether the Director must fix fees for services performed by the Grain Inspection and Weighing Division on a uniform basis throughout the State, or may he fix fees in different parts of the state to generate revenue to pay for our cost pertaining to that area of the State."

Chapter 411, RSMo, provides a comprehensive procedure for inspection, grading and weighing of grain in the state of Missouri, under the standards established by the United States Grain Standards Act (7 U.S.C. §§ 71-87h). We understand from your request that the Missouri Department of Agriculture has been designated the "official agency" for grain inspection and weighing under the provisions of 7 U.S.C. §§ 79-79(a) and that official inspection locations have been designated in the state of Missouri by the administrator of the Federal Grain Inspection Service of the United States Department of Agriculture, pursuant to 7 U.S.C. § 79.

We have previously construed the provisions of Chapter 411, RSMo, in Opinion No. 37, issued February 2, 1967, copy enclosed, which held that pursuant to Section 411.150, RSMo Supp. 1965

Mr. Jack Runyan

(now Section 411.150, RSMo 1969) fees for services rendered under Chapter 411 are to be set by the commissioner (now director) of the Department of Agriculture for the purpose of producing sufficient revenue to meet the necessary expenses of administering Chapter 411. The intent of Section 411.150 is that administration of the Missouri Grain Warehouse Law be self-sustaining through the collection of fees.

We understand from your request that fees for sampling, inspection, weighing, protein and chemical analysis, moisture testing and other services consistent with the provisions of Sections 411.010 to 411.701, RSMo, are uniformly fixed and applied throughout the state so that the revenue collected from the fees meet the necessary expenses of statewide administration of the Grain Inspection Law. However, we further understand that the administration expenses of several official inspection locations exceed the revenues collected from each location, whereas the administration expenses in the remaining locations are less than the revenues collected at those locations. We believe your request to be whether the fees charged for the various services enumerated above may be fixed at each official inspection location so that the fees collected at that inspection point meet the expenses of inspection provided by the Department at that location.

Section 411.150 provides in part:

"1. The commissioner shall have full power to fix the fees for sampling, inspection, weighing, protein or other chemical analysis, and moisture testing or for additional services of whatever nature consistent with the provisions of sections 411.010 to 411.701, which fees shall be regulated in such manner as will, in the judgment of the commissioner, produce sufficient revenue to meet the necessary expenses of the services of sampling, inspection, weighing, chemical analysis or moisture testing, and for administration and clerical work in connection therewith."

A primary rule of statutory construction is to ascertain the intent of the legislature in enacting the interpreted statute so as to promote the object and purpose of the act. State ex rel. Zoological Park Subdistrict of the City and County of St. Louis v. Jordan, 521 S.W.2d 369 (Mo. 1975). This requires review of

Mr. Jack Runyan

the language of the statute giving the words used therein their plain and ordinary meaning. State v. Kraus, 530 S.W.2d 684 (Mo. Banc 1975).

Following these rules of construction, it appears clear from the express language of the statute that the sole requirement placed on the director of the Department of Agriculture in setting fees is that the fees produce sufficient revenue to meet the expenses of providing services at the inspection locations. The manner in which fees will be set has been left to the discretion and judgment of the director, so long as fee revenues meet the expenses of inspection. It is therefore our opinion that the director may, pursuant to Section 411.150, set fees for grain inspection and sampling services either on a uniform basis throughout the state or on a separate basis at each location, so long as the revenues produced from the fees meet the expenses of administering Chapter 411 on a statewide basis or at each location.

As mentioned previously, we understand that the Missouri Department of Agriculture has been designated the "official agency" for grain inspection and weighing under the provisions of the United States Grain Standards Act (7 U.S.C. §§ 71-87h). Section 79 (f)(1)(A)(v) of that Act requires that the official agency show to the satisfaction of the administrator of the Federal Grain Inspection Service that it "will not charge official inspection fees that are discriminatory or unreasonable." 7 U.S.C. § 79(f)(1)(A)(v). While we expressly decline to construe the provisions of this section as applied to the setting of fees by the Department of Agriculture pursuant to Section 411.150, we would advise that you consult with the administrator prior to making judgment on the future setting of fees.

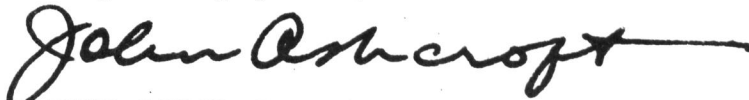
CONCLUSION

It is the opinion of this office that the provisions of Section 411.150, RSMo 1969, allow the director of the Department of Agriculture to set fees for grain inspection and sampling services either on a uniform basis throughout the state or on a separate basis at each grain inspection location, based on the administrative expenses at that location, so long as the revenues produced from the fees meet the costs and expenses of administering Chapter 411.

Mr. Jack Runyan

The foregoing opinion, which I hereby approve, was prepared by my assistant, Greg Hoffmann.

Very truly yours,

A handwritten signature in cursive script, reading "John Ashcroft", with a long horizontal flourish extending to the right.

JOHN ASHCROFT
Attorney General

Enclosure: Op. No. 37
2/2/67, Davis

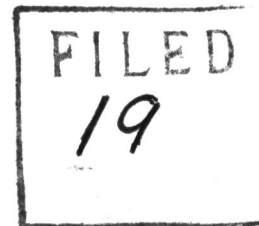
NURSES:

A physician who is located in a state bordering Missouri who meets the requirements of Section 334.150, RSMo, and is authorized to treat patients in Missouri may utilize the services of licensed practical nurses and registered nurses as provided in Section 335.016, RSMo Supp. 1976.

OPINION NO. 19

August 18, 1978

Mr. William Brown, Director
Department of Consumer Affairs,
Regulation and Licensing
505 Missouri Boulevard
Jefferson City, Missouri 65101



Dear Mr. Brown:

This opinion is issued in response to your request concerning the following question:

"Will a licensed nurse employed in Community Health Nursing violate 335.016(7) and (8)(c), RSMo Supp. 1976, if he/she carries out orders for home health care prescribed by an out-of-state physician?"

Section 335.016(7), RSMo Supp. 1976, defines "practical nursing" as follows:

"'Practical nursing' is the performance for compensation of selected acts for the promotion of health and in the care of persons who are ill, injured, or experiencing alterations in normal health processes. Such performance requires substantial specialized skill, judgment and knowledge. All such nursing care shall be given under the direction of a person licensed in this state to prescribe medications and treatments or under the direction of a registered professional nurse;"
(Emphasis added)

Section 335.016(8)(c), RSMo Supp. 1976, defines "professional nursing" in part as follows:

Mr. Oliver F. Overkamp

"'Professional nursing' . . .

* * *

The administration of medications and treatments as prescribed by a person licensed in this state to prescribe such medications and treatments;" (Emphasis added)

Section 335.016(9), RSMo Supp. 1976, defines "registered nurse" as follows:

"A 'registered professional nurse' or 'registered nurse' is one licensed under the provisions of sections 335.011 to 335.096 to engage in the practice of professional nursing."

These sections must be read in pari materia with Chapter 334, RSMo, relating to physicians and surgeons. As stated in ITT Canteen Corporation v. Spradling, 526 S.W.2d 11, 16 (Mo. 1975):

"Generally, statutes on similar subject matters are regarded as in pari materia, and must be considered together even though enacted at different times and found in different places. [Citations omitted] And the Court should, if possible harmonize such statutes. . . ."

Section 334.150, RSMo, provides in part:

"It is not intended by sections 334.010 to 334.140 to prohibit isolated or occasional gratuitous service to and treatment of the afflicted, and sections 334.010 to 334.140 shall not apply to physicians and surgeons commissioned as officers of the armed forces of the United States or of the public health services of the United States while in the performance of their official duties, nor to any licensed practitioner of medicine and surgery in a border state attending the sick in this state, if he does not maintain an office or appointed place to meet patients or receive calls within the limits of this state, and if he complies with the statutes of Missouri and the rules and regulations of the department of public health and welfare relating to the reports of births, deaths and contagious diseases; . . ."

Mr. Oliver F. Overkamp

It would be illogical to assume that the legislature intended to prohibit physicians in such Armed Forces, public health services, or physicians licensed in a border state who come within the provisions of Section 334.150, from utilizing the services of licensed practical nurses and of registered nurses in Missouri.

It is a longstanding rule that a statute will not be construed so as to be against reason. V.A.M.S., Construction of Statutes, § 1.020, Note 42.

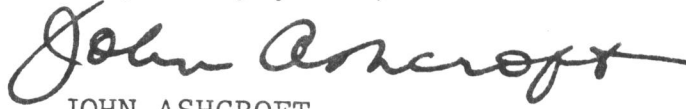
We are therefore of the view that such physicians should be considered as licensed in Missouri for the purpose of interpreting the scope of such nurses' authority.

CONCLUSION

It is the opinion of this office that a physician who is located in a state bordering Missouri who meets the requirements of Section 334.150, RSMo, and is authorized to treat patients in Missouri may utilize the services of licensed practical nurses and registered nurses as provided in Section 335.016, RSMo Supp. 1976.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Michael Elbein.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John Ashcroft", with a stylized, sweeping flourish at the end.

JOHN ASHCROFT
Attorney General

Attorney General of Missouri

JEFFERSON CITY

65101

JOHN ASHCROFT
ATTORNEY GENERAL

(314) 751-3321

January 30, 1978

OPINION LETTER NO. 21

The Honorable George P. Dames
No. 8 Boxwood
O'Fallon, Missouri 63366

Dear Representative Dames:

This letter is in response to your request for an opinion. The question reads as follows:

"May the Supervisor of Liquor Control by regulation establish simplified procedures for the issuing of permits authorized under Section 311.200(7) [sic], RSMo 1969, to include the delegation of authority to District Supervisors to issue such permits in his name?"

The statute referred to in the opinion request is erroneously enumerated. Obviously, the request pertains to Section 311.215, RSMo Supp. 1975. Section 311.215, RSMo Supp. 1975, provides as follows:

"Notwithstanding the other provisions of this chapter, a permit for the sale of malt liquor as defined in Section 311.200, chapter 311, RSMo 1969, for consumption on premises where sold may be issued to any church, school, civic, service, fraternal, veteran, political

or charitable club or organization for the sale of such malt liquor at a picnic, bazaar, fair, or similar gathering. Said permit shall be issued only for the day or days named therein and it shall not authorize the sale of aforesaid malt liquor for more than seven days by any said organization as described above in any fiscal year. For each such permit issued, the licensee shall pay to the director of revenue the sum of ten dollars. No provision of law or rule or regulation of the supervisor shall prevent any wholesaler or distributor from providing customary storage, cooling or dispensing equipment for use by the holder of the license at such picnic, bazaar, fair, or similar gathering."

With respect to the Supervisor's rule-making authority, Section 311.660, RSMo 1969 provides:

"The supervisor of liquor control shall have the authority . . . to make the following regulations, . . . :

* * *

"(3) Prescribe all forms, applications and licenses and such other forms as are necessary to carry out the provisions of this chapter;

* * *

"(10) To make such other rules and regulations as are necessary and feasible for carrying out the provisions of this chapter, as are not inconsistent with this law."

Honorable George P. Dames
Page 3

The question which you have raised concerns the ability of the Supervisor to delegate to his district supervisors the power to issue the permits referred to in Section 311.215, RSMo Supp. 1975. Public officers can delegate those powers and duties which are ministerial in nature, while discretionary duties are not delegable. State ex rel. Shulka Construction Co. v. Reber, 126 S.W. 397, 399 (Mo. 1910). Therefore, the determination must be made as to whether or not the issuance of a permit under Section 311.215, RSMo Supp. 1975, is discretionary or ministerial.

According to the court in Yelton v. Becker, 248 S.W.2d 86, 89 (St.L.Ct.App. 1952),

"Ministerial duties are those duties of a clerical nature which a public officer is required to perform upon a given state of facts, in a prescribed manner, in obedience to the mandate of legal authority, without regard to his own judgment or opinion concerning the propriety of the act to be performed."

On the other hand,

"When the law, in terms or impliedly, commits and entrusts to a public officer the affirmative duty of looking into facts, reaching conclusions therefrom and acting thereon, not in a way specifically directed, [i.e., not merely ministerially] but acting as the result of the exercise of an official and personal discretion vested by law in such officer and uncontrolled by the judgment or conscience of any other person, such function is clearly quasi judicial. . . . ' . . . Usually a discretion that is within the power granted to an officer cannot be controlled by other officers.' " State ex rel. Griffin v. Smith, 258 S.W.2d 590, 593 (Mo. Banc 1953).

At least one qualification is so clearly within the discretionary function that delegation of the power to issue licenses would not be proper. Section 311.060.1, RSMo 1969, provides that, "No person shall be granted a license hereunder unless such person is of good moral character" This requirement admits of the "exercise of an official and personal discretion" of the Supervisor of Liquor Control and that discretion "cannot be controlled by other officers", State ex rel. Griffin v. Smith, supra.

Section 311.210, RSMo 1969, provides that:

"1. All applications for all licenses mentioned in this chapter shall be made to the supervisor of liquor control. .

. . .

"2. The supervisor of liquor control shall have the power and duty to determine whether each application for such license shall be approved or disapproved. . . ."

The Supervisor has the exclusive power to issue permits. The exercise of discretion is involved in the granting of permits. For example, see State ex rel. Bismark Grill, Inc. v. Keirnan, 181 S.W.2d 798, 802 (K.C.Ct.App. 1944), where the court held that the Director of Liquor Control for the City of Kansas City exercised a judicial discretion in granting or refusing permits.

Therefore, it is the view of this office that the issuance of permits under Section 311.215, RSMo Supp. 1975, is a discretionary power of the Supervisor which may not be delegated to district supervisors or any other persons.

Very truly yours,



JOHN ASHCROFT
Attorney General

Attorney General of Missouri

JOHN ASHCROFT
ATTORNEY GENERAL

JEFFERSON CITY

65101

(314) 751-3321

January 23, 1978

OPINION LETTER NO. 22

Mr. Carl R. Noren, Director
Missouri Department of Conservation
2901 North Ten Mile Drive
Jefferson City, Missouri 65101

Dear Mr. Noren:

This letter is in response to your question asking whether a tract of land located in Maries County, Missouri and known as "Clifty Creek natural bridge tract", owned by the L-A-D Foundation, Inc., is exempt from state and local taxes. In our Opinion 120-1976, this office answered a request by the Director of the Department of Natural Resources concerning the status of other land leased to a state agency under a substantially similar lease agreement by the L-A-D Foundation, in which we concluded that it was entitled to tax exemption. A copy of that opinion is attached.

The tract of land subject to your opinion request is more particularly described as follows:

"The Northwest Quarter (NW 1/4) of Section 12, and the Southeast Quarter (SE 1/4) of the Southeast Quarter (SE 1/4), and the South Half (S 1/2) of the Southwest Quarter (SW 1/4) of the Southeast Quarter (SE 1/4), and the South Half (S 1/2) of the South Half (S 1/2) of the Southeast Quarter (SE 1/4) of the Southwest Quarter (SW 1/4) of Section 1, Township 38 North, Range 10 West, containing 230 acres, more or less."

Mr. Carl R. Noren

-2-

The facts involved with respect to this tract and lease arrangement are sufficiently similar to those involved in Opinion No. 120, that it is our opinion the earlier opinion is controlling with respect to this tract, in its present condition.

Therefore, it is the opinion of this office that the Clifty Creek natural bridge tract, in its present condition, is exempt from taxation under the laws of Missouri.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John Ashcroft", with a long horizontal flourish extending to the right.

JOHN ASHCROFT
Attorney General

Enclosure: Op. Ltr. No. 120, 1976

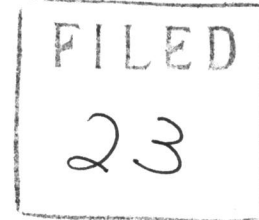
STATE AUDITOR:
REAL ESTATE COMMISSION:

The Missouri Real Estate Commission improperly issued broker's licenses in 1973 and 1974 to persons without requiring them to successfully pass the real estate broker's examination.

OPINION NO. 23

January 30, 1978

Honorable Thomas M. Keyes
State Auditor
State Capitol Building
Jefferson City, Missouri 65101



Dear Mr. Keyes:

This opinion is in response to your following question:

"Was it proper for the Missouri Real Estate Commission to issue broker's licenses in 1974 and 1973 to persons without requiring such persons to successfully pass the real estate broker's examination?"

It is our understanding that the persons inquired about did not pass either an oral or written examination.

The applicable statute is Section 339.040, RSMo 1969, which states in part:

". . . and in order to determine the applicant's qualification to receive a license under this chapter, the commission shall hold oral or written examinations, at such time and place as the commission may determine."

In your request you have further stated the following facts:

"The Missouri Real Estate Commission has issued broker's licenses to various persons without requiring these persons to successfully pass the real estate broker's examination. One such broker's license was issued on August 9, 1974 and a second such license was issued during 1973. Each of the persons who has received a broker's license without examination is an instructor in a real estate school. Not all

Honorable Thomas M. Keyes

instructors in real estate schools are granted
a waiver of the examination requirement."

Under these facts and the above-cited statute, it appears that the Missouri Real Estate Commission was improperly issuing brokers' licenses to various persons without requiring them to pass the real estate broker's examination. We find no provisions in Chapter 339, RSMo, permitting such activity. In order to become a licensed real estate broker under Missouri law, it is necessary that the applicant successfully pass the examination prescribed by Section 339.040.

CONCLUSION

It is the opinion of this office that the Missouri Real Estate Commission improperly issued brokers' licenses in 1973 and 1974 to persons without requiring them to successfully pass the real estate broker's examination.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Terry C. Allen.

Yours very truly,

A handwritten signature in black ink, appearing to read "John Ashcroft", with a long horizontal flourish extending to the right.

JOHN ASHCROFT
Attorney General

SCHOOLS: The amendments to the contract be-
TEACHERS: tween Parkway School District and
SCHOOL DISTRICTS: its superintendent, Wayne W. Fick,
increasing his salary are unen-
forceable, void, and violate Article III, Section 39 (3), Con-
stitution of Missouri, and Section 432.070, RSMo 1969.

OPINION NO. 25

May 2, 1978

Honorable Thomas M. Keyes
State Auditor
State Capitol Building
Jefferson City, Missouri 65101



Dear Mr. Keyes:

This opinion is in response to your question asking:

"Is the contract dated February 14, 1975, which was entered into between the Board of Education of Parkway School District and Wayne W. Fick, Superintendent, binding and enforceable, and if so, do the two amendments to the contract purporting to increase the salary received by Mr. Fick during the second and third years of such contract violate Missouri law?"

The employment contract between Parkway School District and its superintendent for July 1, 1975, to July 30, 1978, reads in part as follows:

"1. In consideration of a salary at a yearly rate of \$36,500 to be paid until June 30, 1976, and an amount to be determined by the Board to be paid in the second and third years, but not less than \$36,500, said Superintendent agrees to perform faithfully the duties of the Superintendent. The annual salary shall be paid in equal installments in amounts with the rules of the Board governing payment of other professional staff members in the District.

"2. The Board hereby retains the right to adjust the annual salary of the

Honorable Thomas M. Keyes

Superintendent during the term of his contract. Any adjustment in salary made during the life of this contract shall be in the form of an amendment and shall become a part of this contract. It is provided, however, that by so doing it shall not be considered that the Board of Education has entered into a new contract with the Superintendent nor that the termination date of the existing contract has been extended."

An amendment of February 5, 1976, reads in part as follows:

"1. The amount of yearly salary to be paid commencing July 1, 1976, and during the second year of the contract until June 30, 1977, is \$39,250."

An amendment of February 3, 1977, reads in part as follows:

"1. The amount of yearly salary to be paid commencing July 1, 1977, and during the third year of the contract until June 30, 1978, is \$42,000."

Section 168.191, RSMo Supp. 1975, covering the employment of school superintendents in counties of the first class except counties of the first class not having a charter form of government provides as follows:

"In all counties of the first class except counties of the first class not having a charter form of government, any board of education, other than boards in urban districts, in charge of a public school system maintaining a classified high school, previously approved by the state board of education, and employing a superintendent devoting his full time to supervisory and administrative work, may employ and enter into contract with a superintendent of schools for the school district for a period of not to exceed three years. This law shall not invalidate or repeal any other law of this state relating to the employment of teachers, principals or superintendents of public schools." (Emphasis added)

Honorable Thomas M. Keyes

Article III, Section 38 (a), Constitution of Missouri 1945, provides in part as follows:

"The general assembly shall have no power to grant public money or property, . . . to any private person, . . ."

Article III, Section 39 (3), Constitution of Missouri 1945, says in part as follows:

"The general assembly shall not have power:

* * *

(3) . . . To grant or to authorize any county or municipal authority to grant extra compensation, fee or allowance to a public officer, agent, servant or contractor after service has been rendered or a contract has been entered into and performed in whole or in part; . . ."

Finally, Section 432.070, RSMo 1969, says:

"No county, city, town, village, school township, school district or other municipal corporation shall make any contract, unless the same shall be within the scope of its powers or be expressly authorized by law, nor unless such contract be made upon a consideration wholly to be performed or executed subsequent to the making of the contract; and such contract, including the consideration, shall be in writing and dated when made, and shall be subscribed by the parties thereto, or their agents authorized by law and duly appointed and authorized in writing."

This office has studied the provisions of the contract and question very carefully. We have considered former opinions of this office which bear on the subject including Opinion No. 171 issued May 4, 1971, to Donald J. Gralike; Opinion No. 157 issued October 2, 1973, to Joseph S. Kenton; Opinion Letter No. 27 issued February 14, 1972, to J. Anthony Dill (copies enclosed). It is our view that all of these opinions are in point on the question. Applying the principles enumerated in such opinions, it appears that the Parkway school board is unwittingly circumventing

Honorable Thomas M. Keyes

the constitutional provisions above cited. The substance of the amendments to the contract is to allow the board an opportunity to award the superintendent a raise or bonus in pay not contemplated under Missouri law when a three-year contract has been executed.

Of equal concern to this office is the question of whether Section 432.070 has been met. In Bride v. City of Slater, 263 S.W.2d 22 (Mo. 1953), the Supreme Court held that a contract between a distributor of oil and the city of Slater was not in writing in conformity with this section wherein the contract provided: ". . . Price: Shall be seller's market price on date of shipment. . . ." The express purpose of Section 432.070 is:

". . . that the terms of the contract shall, in no essential particular, be left in doubt, or to be determined at some future time, but shall be fixed when the contract is entered into. This was one of the precautions taken to prevent extravagant demands, and to restrain officials from heedless and ill-considered engagements. . . ." Id. at 26.

Thus, in this case such contract was held to be void and unenforceable acknowledging that Section 432.070 is mandatory and not directory.

In the facts in your opinion request, it appears that the school board has left uncertain the possible compensation which the superintendent of schools in the district may receive over and above \$36,500. We do not believe that such uncertainty can be cured by amendment which amendment is not only after the initial contract has been entered but also appears to increase the salary of a superintendent upon a contract in violation of Article III, Section 39 (3), Constitution of Missouri 1945.

We further believe that only the amendments are void. Therefore recovery for wrongful payments would be limited to the amount paid over and above \$36,500. County of St. Francois v. Brookshire, 302 S.W.2d 1 (Mo. 1957).

CONCLUSION

It is the opinion of this office that the amendments to the contract between Parkway School District and its superintendent, Wayne W. Fick, increasing his salary are unenforceable, void, and violate Article III, Section 39 (3), Constitution of Missouri, and Section 432.070, RSMo 1969.

Honorable Thomas M. Keyes

The foregoing opinion, which I hereby approve, was prepared by my assistant, Terry C. Allen.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John Ashcroft", with a long horizontal flourish extending to the right.

JOHN ASHCROFT
Attorney General

Enclosures: Op. No. 171
5-4-71, Gralike

Op. No. 157
10-2-73, Kenton

Op. Ltr. No. 27
2-14-72, Dill

Attorney General of Missouri

JOHN ASHCROFT
ATTORNEY GENERAL

JEFFERSON CITY

65101

(314) 751-3321

January 26, 1978

OPINION LETTER NO. 26

Mr. Joe G. Harms, II
Prosecuting Attorney
Chariton County Courthouse
Keytesville, Missouri 65261

Dear Mr. Harms:

This opinion letter is in response to your request asking whether or not a bank's promotional drawing for a prize is illegal in the State of Missouri. The contest requires a participant to enter a bank and write on a slip of paper his name, address and telephone number and place the entry in a container in the bank lobby. Subsequent to this, there is a drawing in which one of the slips of paper is drawn and the person whose name appears on the paper wins a television set. There is no requirement that a person make a purchase, open an account, deposit any kind of money in the bank or have an active account in order to enter the drawing.

While the laws in Missouri do not define the term "lottery," both statutory and constitutional provisions prohibit it. Missouri Constitution, Article III, Section 39, Subsection 9, Section 563.430, RSMo 1969. The term has received several judicial interpretations from the Missouri courts and has been the subject of opinions of this office. The Supreme Court of Missouri said in State, ex Inf. McKittrick v. Globe Democrat Publishing Company, 340 Mo. 862, 110 S.W.2d 705 (Mo. 1937), that a lottery contains three elements: consideration, prize and chance. In view of the fact that Missouri's prohibition of lotteries is found in the Constitution, these elements

Mr. Joe G. Harms, II

should be applied broadly to fulfill the apparent purpose of the prohibition. In Mobil Oil Corporation v. John C. Danforth, 455 S.W.2d 505 (Mo. 1970), the Supreme Court held that the element of consideration was present even though participants paid nothing for the right to enter a game of chance in which a prize was awarded. By the facts of that case, going to the place of business to obtain the right to participate was held to be the consideration.

The Mobil Oil decision effectively invalidated the 1963 Amendment of Section 563.430, which provided that a lottery exists only where consideration in the form of money, or its equivalent, is paid to or received by the person awarding the prize. The Mobil Oil case made it clear the Constitutional prohibition against lotteries cannot be changed by the enactment of a law by the legislature.

However, it should be pointed out that the Missouri legislature has proposed a constitutional amendment that will be voted on at the next General Election or at a special election called by the Governor which will permit the voters to decide whether they want to amend the Missouri Constitution and allow promotional contests in which a citizen can participate if there is no money or something of value exchanged directly for the chance of participating in the game. However, this resolution (House Joint Resolution No. 8) as passed by the 79th General Assembly has not been voted upon by the citizens of this state and is not effective at present.

Therefore, it is our view that a contest that requires the entrants to go to the bank in order to obtain an entry blank and in which prizes are awarded based on a drawing from the submitted entry blanks constitutes a lottery within the meaning of Article III, Section 39, Missouri Constitution, and, therefore, is prohibited in Missouri.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John Ashcroft", with a stylized, flowing script.

JOHN ASHCROFT
Attorney General

Attorney General of Missouri

JEFFERSON CITY

(314) 751-3321

JOHN ASHCROFT
ATTORNEY GENERAL

65101

January 11, 1978

OPINION LETTER NO. 29

Honorable Emory Melton
State Senator, District 29
201 West 9th
Cassville, Missouri 65625

Dear Senator Melton:

This opinion is in response to your question asking:

"My question is whether or not the Department of CARL has any authority or control over the Division of Tourism other than submitting the budget and approving the annual report, if indeed the Division is assigned to CARL."

Applicable sections of law are as follows:

Section 4.1, Omnibus Reorganization Act of 1974, Appendix B, RSMo Supp. 1975, provides:

"There is hereby created a department of consumer affairs, regulation and licensing to be headed by a director appointed by the governor, by and with the advice and consent of the senate."

Section 4.13, Omnibus Reorganization Act of 1974, Appendix B, RSMo Supp. 1975, provides:

"All the powers, duties and functions vested in the tourism commission, chapter 258, RSMo, and others, are transferred to the division

Honorable Emory Melton

of tourism, which is hereby created, by type III transfer."

Section 1.7 (1)(c), Omnibus Reorganization Act of 1974, Appendix B, RSMo Supp. 1975, provides:

"Under this act a type III transfer is the transfer of a department, division, agency, board, commission, unit or program to the new department with only such supervision by the head of the department for budgeting and reporting as provided under subdivisions (4) and (5) of subsection 6, of this section and any other supervision specifically provided in this act or later acts. Such supervisions shall not extend to substantive matters relating to policies, regulative functions or appeals from decisions of the department, division, agency, board, or commission unless otherwise provided by this act or later acts. The method of appointment under type III transfer will remain unchanged unless specifically altered by this act or later acts."

Section 1.6 (2), Omnibus Reorganization Act of 1974, Appendix B, RSMo Supp. 1975, provides in part:

". . . The plan shall provide for the level of compensation for division and other administrative positions, subject to appropriations therefor. . . ."

Section 1.6 (4)(a), Omnibus Reorganization Act of 1974, Appendix B, RSMo Supp. 1975, provides:

"The head of each department, unless otherwise provided by this act, shall have exclusive budget-making powers for the department and for each division, commission, board, unit or other agency within the department. The head of the department shall submit estimates of requirements for appropriations on behalf of the department and each division, commission, board, unit or other agency within the department, as provided by section 33.220, RSMo. Each division, commission, board, unit or other

Honorable Emory Melton

agency within the department shall present its estimate of requirements to the department head each year at or before such time as the head of the department directs. The department head shall review each estimate submitted to it and may modify any estimate. The department head shall consolidate all estimates or requirements for appropriations and prepare an estimate for submission on behalf of the department and each division, commission, board, unit or other agency within the department, subject to the form prescribed by section 33.220, RSMo."

Section 1.6 (4)(b), Omnibus Reorganization Act of 1974, Appendix B, RSMo Supp. 1975, provides in part:

"The head of the department shall prepare all budgets for agencies within his department and shall present the budget to the commissioner of administration. . . ."

Section 258.320.1, RSMo 1969, states:

"The commission shall employ a staff headed by a director of tourism who shall be qualified by education and experience in public administration with a background in the use of the various news media as to the dissemination of public information to promote tourism. The director shall serve at the pleasure of the commission, and the commission shall fix his compensation within the appropriation made for the purpose."

Along with your opinion request, you forwarded to us a copy of a memorandum of October 17, 1977, from the present director of the Division of Tourism, Jim Pasley, concerning type III transfers and the Department of Consumer Affairs, Regulation and Licensing. We gather from reviewing your opinion request and the attached memorandum that the salary of the director of a division in a type III transfer is at the heart of your inquiry.

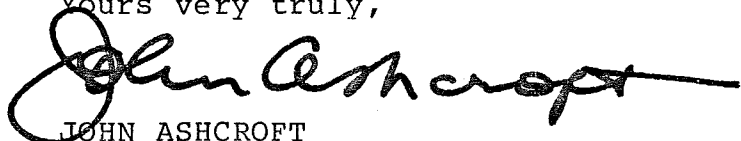
In light of the above-cited law, it is our view that the Division of Tourism created by reorganization was transferred to the Department of Consumer Affairs, Regulation and Licensing by virtue of a type III transfer.

Honorable Emory Melton

It is our further view that the question which you have asked in light of the memorandum of Mr. Pasley of October 17, 1977, has been laid to rest in a prior opinion of this office, No. 53 issued to Michael Garrett on March 18, 1975. That opinion specifically held that department heads have authority under Senate Bill No. 1, 77th General Assembly, to set the salary of division and other administrative positions subject to appropriations therefor. While under a type III transfer the department director is responsible for budgeting and reporting and not for supervision extending to substantive matters relating to policies, regulative functions, or appeals from the decisions of the division, it is apparent that a department director under Section 1.6 (2), Omnibus Reorganization Act of 1974, has been authorized to determine the level of compensation for the director of the Division of Tourism. Thus, it is our belief that the essential question raised by your opinion request has been answered in Opinion No. 53. That part of Section 258.320.1 relating to salary was superseded by the Reorganization Act.

It is our view that the Division of Tourism was transferred to the Department of Consumer Affairs, Regulation and Licensing by a type III transfer under the Omnibus Reorganization Act of 1974 and that the department director is responsible for the budgeting and reporting of the Division of Tourism and that he may establish the salary of the director of that division but may not supervise any substantive matters relating to policies, regulative functions, or appeals from the decisions of the division.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John Ashcroft", with a stylized, sweeping flourish at the end.

JOHN ASHCROFT
Attorney General

ELECTIONS:
CANDIDATES:
GOVERNOR:

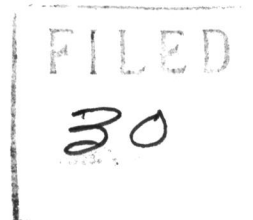
Section 17 of Article IV of the Missouri Constitution, limiting the number of times a person may be elected to the office of governor,

is applicable to the person who held the office because of election to such office when such section became effective.

OPINION NO. 30

January 27, 1978

Honorable Fred W. DeField
Member, House of Representatives
203 North Thorn Street
Charleston, Missouri 63834



Dear Mr. DeField:

This is in answer to your request for an opinion of this office which reads as follows:

"Is a state constitutional amendment prohibiting a person from being elected to the office of governor more than twice applicable to the governor in office at the time of the adoption of the amendment?"

Section 17 of Article IV of the Missouri Constitution, reads as follows:

"The governor, lieutenant governor, secretary of state, state treasurer and attorney general shall be elected at the presidential elections for terms of four years each. The state auditor shall be elected for a term of two years at the general election in the year 1948, and his successors shall be elected for terms of four years. No person shall be elected governor or treasurer more than twice, and no person who has held the office of governor or treasurer, or acted as governor or treasurer, for more than two years of a term to which some other person was elected to the office of governor or treasurer shall be elected to the office of governor or treasurer more than once. The heads of all the executive departments shall be appointed by the governor, by and with the advice and

Honorable Fred W. DeField

consent of the senate. All appointive officers may be removed by the governor and shall possess the qualifications required by this constitution or by law." (emphasis added)

Article I, Section 13 of the Missouri Constitution reads as follows:

"That no ex post facto law, nor law impairing the obligation of contracts, or retrospective in its operation, or making any irrevocable grant of special privileges or immunities, can be enacted."

The general rule of construction is that constitutional and statutory provisions are presumed to operate prospectively. State ex rel. Hall v. Vaughn, 483 S.W.2d. 396 (Mo. Banc 1972). However, a provision is not retrospective because some of the requisites for its application to a situation are drawn from a time antecedent to the adoption of the provision. State ex rel. Ross to use of Drainage District No. 8 of Pemiscot County v. General American Life Insurance Company, 85 S.W.2d 68, 74 (Mo. 1935). In Attorney General Opinion No. 46, dated March 6, 1956, to the Honorable Devere Joslin, this office interpreted Section 182.190, RSMo Supp. 1955, which limited the number of terms that a member of the board of trustees of a city library could serve. That section reads, in part, as follows:

"* * *No member of the board shall serve for more than three successive full terms and shall not be eligible for further appointment to the board until two years after the expiration of the third term.
* * *"

This office concluded that the limitation on terms was applicable to incumbents of the board at the time of the statute's enactment. That opinion stated that the application of the statute to incumbents was not retrospective merely because the facts constituting the disqualification (two previous elections to the library board of trustees) may have occurred prior to the passage of the act.

A copy of Opinion No. 46, dated March 6, 1956, to Joslin, is enclosed for your information.

In State ex rel. Scott v. Dircks, 211 Mo. 568, 111 S.W. 1 (1908), a Missouri constitutional amendment stating that all counties were to elect sheriffs in 1908 and thereafter at four year intervals, and limiting the eligibility to serve to four years in any one period, was held not to disqualify a sheriff elected in 1906 from running for re-election in 1908. The provisions of Article IX, Section 10 of the 1875 Constitution which was in question read in part as follows:

"There shall be elected by the qualified voters in each county on the first Tuesday following the first Monday in November, A. D. 1908, and thereafter every four years, a sheriff and coroner. They shall serve for four years and until their successors be duly elected and qualified, unless sooner removed for malfeasance in office. Before entering on the duties of their office they shall give security in the amount and in such manner as shall be prescribed by law and shall be eligible only four years in any one period." (emphasis added)

The court, in holding the four year limit not applicable to the period served by a sheriff prior to the election of 1908, seized on the language underscored in the above quote:

"They shall serve for four years and until their successors be duly elected and qualified. Unquestionably 'they' in this sentence refers to those elected in 1908. The amendment then continues, 'Before entering on the duties of their office, they [that is to say, those elected in 1908, and their successors in office] shall give security in the amount and in the manner as shall be prescribed by law, and shall be eligible only four years in one period,' evidently again referring to those elected in 1908, and their successors.

"But for the unequivocal language of the amendment itself there would be great force in the argument that the provision limiting the term of a sheriff to four years is one of eligibility, which might refer to the past incumbency of the office as well as the future, but when it is borne in mind that the amendment of 1906 leaves

Honorable Fred W. DeField

nothing to implication, but expressly repeals the former constitutional provision, to wit, section 10 of article 9 of the Constitution of 1875, it seems to us that it marks a departure in the law, and creates a new rule for the future." 111 S.W. at 3.

In Dircks, the plain language of the amendment stated that it was to apply only to those sheriffs elected in 1908 and subsequent elections. Article IV, Section 17, by its plain language establishes the disqualification applicable to any person wishing to run for governor after the time of its adoption. We see no reason to depart from the plain, unambiguous language of Article IV, Section 17. That section established a new disability, but not "in respect to transactions already past." It is prospective because it affects only elections taking place after it became effective. It does not invalidate any previous election in which someone possessing the disqualification may have been elected. Therefore, Article IV, Section 17 does apply to the incumbent at the time of its adoption with respect to elections occurring after that time.

Had Article IV, Section 17 not been intended to apply to such incumbent, the framers could have followed the example of the 22nd Amendment of the United States Constitution, which reads as follows:

"No person shall be elected to the office of the President more than twice, and no person who has held the office of President, or acted as President, for more than two years of a term to which some other person was elected President shall be elected to the office of the President more than once. But this Article shall not apply to any person holding the office of President when this Article was proposed by the Congress, and shall not prevent any person who may be holding the office of President, or acting as President, during the term within which this Article becomes operative from holding the office of President or acting as President during the remainder of such term." (emphasis added)

Article IV, Section 17 contains no such "saving" clause for the incumbent. Yet, the model for such a clause was available in the 22nd Amendment of the United States Constitution (which was adopted in 1951).

Honorable Fred W. DeField

Neither is Article IV, Section 17 unconstitutional as applied to the person who held the office because of election to such office when it became effective. It does not divest him of "any vested right acquired under existing laws." Under Missouri case law, there is no vested or property right in a public office. See State ex rel. Hall v. Vaughn, supra; State ex rel. Voss v. Davis, 418 S.W.2d. 163 (Mo. 1967).

CONCLUSION

It is the opinion of this office that Section 17 of Article IV, of the Missouri Constitution, limiting the number of times a person may be elected to the office of governor, is applicable to the person who held the office because of election to such office when such section became effective.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Michael Elbein.

Very truly yours,



JOHN ASHCROFT
Attorney General

Enclosure:

Op. No. 46, 3-6-56, Joslin

BARBERS:
LICENSES:
COSMETOLOGY:

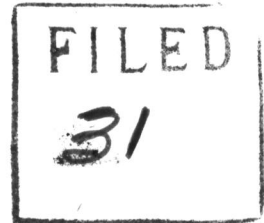
Barbers and cosmetologists may work in the same physical area if such area is licensed as a cosmetology shop and is subject to inspection

by both the State Board of Cosmetology and State Board of Barber Examiners.

OPINION NO. 31

April 19, 1978

William Brown, Acting Director
Department of Consumer Affairs,
Regulation and Licensing
505 Missouri Boulevard
Jefferson City, Missouri 65101



Dear Mr. Brown:

This is in response to a request from your predecessor for an opinion of this office which reads as follows:

"1. Under Section 329.140.4 RSMo., 1969, can one establishment have both barbers and cosmetologists operating in the same physical area; or need the barber operations be partitioned from the cosmetology operations?

"2. If both barbers and cosmetologists can operate in the same physical area, must that area be a registered cosmetology shop and be subject to inspection by both State Board of Cosmetology and Board of Barber Examiners?"

Section 328.010, RSMo 1969, defines the occupation of barber as follows:

"Any person who is engaged in the capacity so as to shave the beard or cut and dress the hair for the general public, shall be construed as practicing the occupation of 'barber', and the said barber or barbers shall be required to fulfill all requirements within the meaning of this chapter."

Mr. William Brown

Section 328.020, RSMo 1969, requires one who engages in the occupation of "barber" to be registered with the Board of Barber Examiners. That section reads as follows:

"It shall be unlawful for any person to follow the occupation of a barber in this state, unless he shall have first obtained a certificate of registration, as provided in this chapter."

The practice of cosmetology is defined in Section 329.020, RSMo 1969, as follows:

". . . Any person who engages for compensation in any one or any combination of the following practices, to wit: Arranging, dressing, curling, singeing, waving, permanent waving, cleansing, cutting, bleaching, tinting, coloring or similar work upon the hair of any person by any means shall be construed to be practicing the occupation of a hairdresser. Any person who with hands or mechanical or electrical apparatuses or appliances, or by the use of cosmetic preparations, antiseptics, tonics, lotions or creams engages for compensation in any one or any combination of the following practices, to wit: Massaging, cleaning, stimulating, manipulating, exercising, beautifying or similar work, upon the scalp, face, neck, arms, or bust or removing superfluous hair by means other than electricity about the body of any person shall be construed to be practicing the occupation of a cosmetologist or cosmetician;"

Section 329.140.4, RSMo 1969, reads as follows:

"Any shop owner or manager employing any person as hairdresser, cosmetologist or manicurist who does not have the required certificate shall be guilty of a misdemeanor and his shop certificate or registration may be revoked or suspended."

From the statutes quoted above, it is clear that a person purporting to be and acting as a barber must be licensed as a

Mr. William Brown

barber, and that a person purporting to be and acting as a cosmetologist must be licensed as a cosmetologist. While it is true that cosmetologists and barbers may, at times, engage in the same sort of activities, they are not purporting to act as anything other than the profession for which they are licensed, either a barber or a cosmetologist.

It is the view of this office that barbers and cosmetologists may work in the same physical area without violating Section 329.140.4, RSMo, so long as the persons working in the shop hold themselves out as practicing only the trade for which they are licensed.

Section 329.045, RSMo 1969, requires, in part:

"Every shop or establishment in which the occupation of hairdresser, cosmetologist, or manicurist is practiced shall be required to obtain a certificate of registration from the state board of cosmetology. . . ."

It is the view of this office that any shop in which both barbers and cosmetologists work in the same physical area must be licensed as a cosmetology shop.

4 CSR 60-3.010 contains the sanitary regulations prescribed for barber shops. 4 CSR 60-3.010(2) reads as follows:

"All barber shops and barber schools shall be kept in a clean, healthful and sanitary condition at all times, and must be open to the members of the State Board of Barber Examiners and their deputy-inspectors for inspection at all times during business hours. Each holder of a license or apprenticeship permit shall post same in a conspicuous place back of his working chair, where it may be readily seen by all persons whom he may serve."

Section 329.210(3), RSMo 1969, states that the Board of Cosmetology shall have the power

"To provide for the inspection of shops by licensed cosmetologists as to their sanitary conditions and to appoint the necessary inspectors and, if necessary, examining assistants."

Mr. William Brown

Therefore, a cosmetologist shop in which both barbers and cosmetologists work in the same physical area is subject to inspection by both the State Board of Cosmetology and Board of Barber Examiners.

CONCLUSION

It is the opinion of this office that barbers and cosmetologists may work in the same physical area if such area is licensed as a cosmetology shop and is subject to inspection by both the State Board of Cosmetology and State Board of Barber Examiners.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Michael Elbein.

Very truly yours,

A handwritten signature in dark ink, reading "John Ashcroft". The signature is written in a cursive, slightly stylized font. The first name "John" is written with a large, looping 'J'. The last name "Ashcroft" is written with a prominent 'A' and a long, sweeping tail that extends to the right.

JOHN ASHCROFT
Attorney General

Attorney General of Missouri

JOHN ASHCROFT
ATTORNEY GENERAL

JEFFERSON CITY

65101

(314) 751-3321

October 19, 1978

OPINION LETTER NO. 32

Honorable Warren Welliver
State Senator, 19th District
317 Guitar Building
P. O. Box 758
Columbia, Missouri 65201

Dear Senator Welliver:

This letter is in response to your request for a ruling on the following question:

"Are patients who now reside in homes for the mentally retarded, but whose parents do not reside in Missouri, residents of Missouri for the purpose of receiving benefits from the Department of Mental Health?"

In your request, you have presented the following hypothetical cases to illustrate your question:

"Case #1 - The patient was placed in the home for retarded children by his parents for long-term care and will probably be in the home for the rest of his life. The parents do not live in the State of Missouri. The patient is over 21 years old and has lived at the home for more than a year. No guardianship has been established.

"Case #2 - The patient was placed in the home for the mentally retarded by a Department of Mental Health from another

Honorable Warren Welliver

state. Because of the program available at the home for the mentally retarded, it is expected that the patient will stay in the home for the rest of his life. However, the other state will not pay for his care and treatment past the age of 21, because it claims that the patient then becomes a resident of Missouri. The patient is now 21 years old and has been in the home since he was 17. No guardianship has been established.

"Case #3 - A parent who lives out of the state has established guardianship for his son on the basis of incompetency. The parent placed the son at the home for the mentally retarded and expected him to spend most of his life there. The parent lives out of the State of Missouri. The son has lived at the home for the mentally retarded for five years and is now 33 years old."

In responding to your question, we do not attempt to determine the obligations of this state or other member states under the Interstate Compact on Mental Health, Sections 202.880 RSMo et. seq., because such determinations should be made in conjunction with the member state in the context of the particular fact situations.

The question presented in the opinion request, and the accompanying hypotheticals assume that the receipt by the patients of benefits from the Missouri Department of Mental Health turns on the question of whether the patients are residents of Missouri. However, it is necessary to consider factors other than residency in answering your question.

The Department of Mental Health is charged by statute with paying the costs of care and treatment only for individuals who are patients of the Department. Section 202.863 RSMo 1977 Supp. reads in part:

"1. Patients admitted to the facilities for the mentally ill or retarded of the department of mental health under the provisions of this law shall be classified as private or state patients . . .

* * *

"3. If any person is admitted to a state facility who is unable to pay for care and treatment, as determined by the application

Honorable Warren Welliver

of the standard means test pursuant to the provisions of section 202.330, the cost of said care and treatment shall be paid for out of funds appropriated to the department of mental health." (emphasis added).

If patients in the hypotheticals are not patients of the Department of Mental Health, they would not be eligible for departmental benefits.

There are several ways under statute in which an individual may seek to become a patient of the Department of Mental Health. For example, admission may be obtained through medical certification (Section 202.601 RSMo 1969), as a voluntary patient (Section 202.783 (RSMo 1969), by order of a probate court (Section 202.807 RSMo Supp. 1975), by order of a juvenile court (Section 211.201), or by various emergency procedures (Sections 202.800, 202.803, 202.805 RSMo 1969). In H.C.S.S.B. 651, which repeals many of the sections just cited, effective, January 2, 1979, similar procedures are specified for becoming a patient of the Department of Mental Health. See, e.g., Section 202.187, providing for voluntary admissions of mentally retarded and developmentally disabled persons to private and public facilities. Through one of these procedures, an individual may obtain the status of a patient of the Department of Mental Health without being a resident of Missouri.

The statute does not provide that an individual may become a department patient simply by being hospitalized in an institution situated within Missouri. Rather, an individual can become a patient of the department by one of the means provided in the statutes. It does not appear from the hypotheticals that these patients are departmental patients; therefore, absent acquisition of that status, departmental benefits would not be available to them.

If the individuals in the hypotheticals are accepted as patients by the department, they do not qualify automatically for the free receipt of department benefits or for unconditional payment by the department of all or part of the cost of their care and treatment. Rather, one must look to the statutes governing the department and case law interpreting those statutes to determine which parties are responsible for the costs. Contrary to the assumption implicit in the opinion question and hypotheticals, resolution of this question does not turn on the residency of the parties involved.

Honorable Warren Welliver

The law is clear that the department is to look first to the patient's estate for payment of costs. Section 202.240, RSMo 1977 Supp., reads in part:

"If any person be admitted to a facility of the department who has an estate or if while a patient of any such facility shall become possessed of such an estate, such patient or his guardian shall pay for his support and expenses at the facility as determined by the application of the standard means test pursuant to the provisions of section 303.330 out of the patient's estate; and if such person shall at any time become indigent, he shall be supported and maintained at the facility by the funds appropriated to the department of mental health." (emphasis added).

See also Section 202.831 RSMo Supp. 1975 which provides that those responsible by law for the payment of patient costs remain responsible in nursing home and related placements.

Indigency rather than residency is the criterion for payment of patient costs by the department. These sections do not exempt the estates of non-resident patients from liability for these costs but instead mandate that any person admitted to a department facility and having the resources shall be responsible for the costs of his treatment and care.

In each of the hypotheticals, the patient is an adult. It is not clear whether or not the patient has an estate available to pay costs accrued in receiving department care, assuming that the individuals in each case are accepted as patients by the department. If an estate is not available, or the estate is exhausted, the department may properly look to the parents of the patient for payment of costs.

The Missouri Supreme Court has endorsed the principle of parental responsibility for the costs of supporting an adult child in certain circumstances. In the case of Fower v. Fower Estate, 448 S.W.2d 585 (Mo. 1970) the court held that a parent has a duty during his lifetime to support his adult unemancipated, unmarried and needy child who since some time during minority has been totally disabled. See also, State ex rel. Kramer v. Carroll, 309 S.W.2d 654 (Mo. App. 1958). The patients in the hypotheticals appear to fit

Honorable Warren Welliver

the criteria for continued parental responsibility into the child's majority. For example, hypotheticals one and three state that the patients are expected to be institutionalized most of their lives, an apparent recognition of serious disability.

If the responsible party does not pay for the costs of treatment and care, the patient may be discharged when payment is not forthcoming. The superintendent of the facility

"[M]ay return the patient to the sheriff of the county or municipality or to the guardian, trustee or person responsible for the payment of the installment, and at the expense of the county, municipality, guardian, trustee or person." Section 31.050 RSMo 1969.

This section, like the others discussed in this opinion, does not exempt from its coverage non-residents who are patients of the department.

Specific authority is also given to the department to transfer to the state of residency non-residents committed by a court order to the department, assuming the making of "proper arrangements" for the transfer with the state of residency, §202.875 RSMo 1969.

As the above discussion indicates, the department is responsible for the payment of the costs of care and treatment of the patients under discussion only if, (a) the individual is a patient of the department, (b) the individual is indigent, and (c) the parents are indigent.

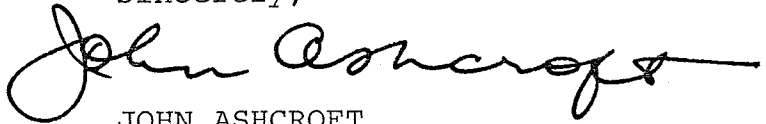
Under the principles discussed above, the individuals in hypotheticals one and three are not eligible for benefits from the Department of Mental Health. The facts presented do not indicate that they are currently patients of the Department. Such a status is a prerequisite to the assumption by the Department of costs, and mere confinement in a private institution located in Missouri does not make one a patient of the department. In addition, simply becoming a patient of the department does not entitle one to receive free services of the department, because the estate of the patient and the patient's parents remain liable, unless they are indigent. Finally, it is to be noted that the estates of those individuals who receive aid from the Department of Mental

Honorable Warren Welliver

Health are liable for this debt. \$473.398 RSMo 1977 Supp. It is clear from this discussion that the legislature intends for the Department to expend its own funds for the costs of caring for its patients only when no other alternative source of payment is available.

In the second hypothetical, the mental health agency of another state placed the patient in the private facility in Missouri. Such a placement imposes no obligation upon the Missouri Department of Mental Health. The other state remains responsible for payment of the cost of care and treatment. The fact that the individual has turned 21 years of age is irrelevant in this situation. Disputes concerning the status of such patients should be resolved, if possible, through use of the Interstate Compact on Mental Health.

Sincerely,

A handwritten signature in black ink, appearing to read "John Ashcroft", with a long horizontal flourish extending to the right.

JOHN ASHCROFT
Attorney General

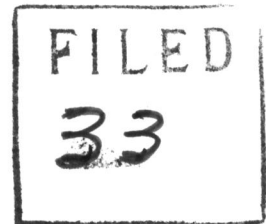
STATE TAX COMMISSION:

The State Tax Commission has the statutory authority to appoint hearing examiners for conducting initial investigations and making advisory recommendations in appeals taken under Section 138.430(2), RSMo 1969.

OPINION NO. 33

April 20, 1978

Tom R. Otto, Chairman
State Tax Commission
P. O. Box 146
Jefferson City, Missouri 65101



Dear Mr. Otto:

This is in response to a request from your predecessor for an official opinion of this office answering the following question:

"Is there current statutory authority for the appointment of hearing examiners by the State Tax Commission for the purpose of conducting initial investigations and hearings and making advisory recommendations on appeals taken under Section 138.430(2), RSMo 1969?"

There are several Missouri statutes which are pertinent to this question. Section 138.430(2), RSMo 1969, provides as follows:

"Every owner of real property or tangible personal property and every merchant and manufacturer shall have the right of appeal from the local boards of equalization under rules prescribed by the state tax commission. Said commission shall investigate all such appeals and shall correct any assessment which is shown to be unlawful, unfair, improper, arbitrary or capricious."
(Emphasis supplied.)

Section 138.290(1), RSMo Supp. 1975, states:

"For the purpose of making any investigation, or the performance of other duties with regard to any matters relating to taxation, the commission may appoint by an

Mr. Tom R. Otto

order in writing an agent, or agents, whose duties shall be prescribed in the order."
(Emphasis supplied.)

Clearly, under this statute the State Tax Commission has general authority to appoint agents and prescribe specific duties to be performed, including the conducting of investigations and hearings in ad valorem tax appeals.

More specific authority for the appointment of hearing examiners per se is found in Section 138.310, RSMo 1969. There it is stated:

"1. The commission may conduct a number of investigations contemporaneously through different agents, and may delegate to an agent the taking of all testimony bearing upon any investigation or hearing.

"2. The decision of the commission shall be based upon its examination of all testimony and records.

"3. The recommendations made by such agent shall be advisory only, and shall not preclude the taking of further testimony if the commission orders further investigation."
(Emphasis supplied.)

Implied authority for the Commission's appointment of hearing examiners is provided by the statutory language adopted in Sections 138.460 and 138.470, RSMo 1969, which empowers the Commission or its "duly authorized agent or representative" to inspect and, if necessary, correct assessment rolls pursuant to a proper hearing. The hearing and review procedures of these sections have been held applicable to appeals taken under Section 138.430(2), RSMo 1969. T. J. Moss Tie Company v. State Tax Commission, 345 S.W.2d 191, 194 (Mo. 1961); Warnecke v. State Tax Commission, 340 S.W.2d 615, 617 (Mo. 1960).

Section 138.300, RSMo 1969, states that an agent of the Tax Commission in discharging his duties, "has all the powers of an inquisitional nature granted in sections 138.190 to 138.490 to the Commission and all powers lawful throughout the state given by law to a notary public relative to depositions."

Thus, it appears that the State Tax Commission has authority to appoint hearing examiners by written order.

Mr. Tom R. Otto

CONCLUSION

Therefore, it is the opinion of this office that the State Tax Commission has the statutory authority to appoint hearing examiners for conducting initial investigations and making advisory recommendations in appeals taken under Section 138.430(2), RSMo 1969.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Philip Baker.

Very truly yours,

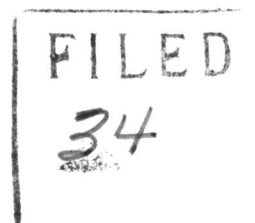
A handwritten signature in dark ink, appearing to read "John Ashcroft", with a long horizontal flourish extending to the right.

JOHN ASHCROFT
Attorney General

April 18, 1978

OPINION LETTER NO. 34
Answer by Letter - Wood

Honorable Hardin C. Cox
State Senator
Room 416, Capitol Building
Jefferson City, Missouri 65101



Dear Senator Cox:

You have requested a formal opinion of this office on the following question:

"Does Act 48 of the 79th General Assembly (Senate Bill 198), passed in 1977, apply to nursing home districts formed under Chapter 198 RSMo? In the event the answer to the preceding question is in the affirmative, may the County Court take over all the functions, duties, obligations, etc. of the Nursing Home District and operate the nursing home?"

You have thus inquired about the affect of Senate Bill No. 198 (1977) upon the Nursing Home District Law, §§198.200 - 198.360, RSMo. Senate Bill No. 198 pertains to "[a]ny special purpose district formed under the provisions of a statute of this state requiring approval by the voters of the district and for which no specific procedure is provided to terminate or dissolve such a district. . . ." (Emphasis added.)

Section 198,360 in the Nursing Home District Law provides for a referendum on dissolution of a district whenever the district is not operating a nursing home and three separate

Honorable Hardin C. Cox

bond issue elections have failed. We believe this section sets forth a "specific procedure . . . to . . . dissolve" a nursing home district and accordingly feel that Senate Bill No. 198 does not apply to nursing home districts.

In view of our negative answer to your first question, an answer to your second question is unnecessary.

Very truly yours,

JOHN ASHCROFT
Attorney General

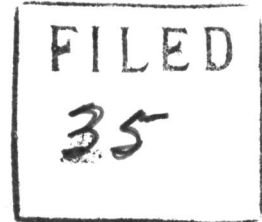
PLANNING AND ZONING:
COUNTY PLANNING AND ZONING:

The platting and recording of a subdivision is not sufficient use and maintenance of existing property so as to exempt it from changes in county requirements, §§64.850-64.895, RSMo.

OPINION NO. 35

May 23, 1978

Honorable Milt Harper
Prosecuting Attorney, Boone County
Boone County Courthouse
Columbia, Missouri 65201



Dear Mr. Harper:

You have requested a formal opinion of this office on the following question:

"Is the mere platting of a subdivision sufficient 'use and maintenance', as those terms are used in §64.890 RSMo, to 'grandfather' a landowner and prevent the application of amended zoning regulations to his subdivision where the lots therein were designed on the basis of the previous regulations?"

We understand that prior to March, 1976, a particular area of Boone County was zoned residential multi-family units with a minimum lot size of 3,500 square feet per living unit. In March, 1976, the county court amended the zoning regulations so as to require minimum lot sizes of 5,000 square feet per living unit. Prior to March, 1976, a landowner in this area platted and recorded a subdivision of duplex lots with a minimum size of 3,000 square feet per living unit but less than 5,000 square feet. The landowner took no further steps to develop the subdivision.

§64.850, RSMo states in material part:

". . . [T]he county court . . . may
. . . regulate and restrict . . . in
the unincorporated portions of the
county, the height, number of stories,

Honorable Milt Harper

and size of buildings, the percentage of lots that may be occupied, the size of yards, courts and other open spaces, the density of population, the location and use of buildings, structures and land for trade, industry, residence or other purposes." (emphasis added)

§64.890.2, RSMo provides in material part:

" . . . The powers granted by . . . sections 64.850 to 64.880 shall not be construed:

(1) So as to deprive the owner, . . . of any existing property of its use or maintenance for the purpose to which it is then lawfully devoted;"

We do not believe that the mere platting of the subdivision and the recording of the same prior to the adoption of the increased lot size requirement was a use or maintenance of the property in the sense of §64.890.2.

In Hill v. City of Manhattan Beach, 491 P.2d 369, 373 (Cal. 1971), it is observed:

" . . . Although a reasonable nonconforming use of property of substandard size which creates no public nuisance forecloses the application of a subsequently enacted zoning ordinance which increases the minimum lot size, 'land which has not been used for building purposes would not create a nonconforming use. "A nonconforming use is a lawful use existing on the effective date of the zoning restriction and continuing since that time in nonconformance to the ordinance" . . . ' Nonuse is not a nonconforming use . . . " 491 P.2d at 373

The court in Sherman-Colonial Realty Corp. v. Goldsmith, 230 A.2d 568, (Conn. 1967), stated:

" . . . The mere filing of maps for the subdivision of a parcel of real estate does not necessarily immunize the subject property from the operative effect of sub-

sequent subdivision regulations. Otherwise, 'a property owner, by the process of map filing, could completely foreclose a zoning authority from ever taking any action with respect to the land included in the map, regardless of how urgent the need for regulation might be.' . . . There is nothing in the record to indicate that the plaintiffs actually used the property or expended any money in physically changing the nature of the undeveloped land or that they cannot recoup in a conforming use of the land the engineering expenses they have incurred. 'To be a nonconforming use the use must be actual. It is not enough that it be a contemplated use nor that the property was bought for the particular use. The property must be so utilized as to be "irrevocably committed" to that use . . .'" 230 A.2d at 572

The court in Ardolino v. Florham Park Board of Adjustment, 130 A.2d 847 (N.J. 1957) pointed out:

". . .[I]t is the use in fact existing on the land at the time of the adoption of a new zoning ordinance, and that alone, that may be continued contrary to any new regulations, . . .

'* * * it is an existing use occupying the land, that the statute protects; the statutes does not deal in mere intentions . . .'

"Lot 366A was vacant land at time of the adoption of the new ordinance and therefore could not qualify for any exemption from the provisions of the ordinance on a nonconforming use ground. . . ." 130 A.2d at 852-853

And it was noted in County of Saunders v. Moore, 155 N.W.2d 317 (Neb. 1967):

". . . We feel, . . . that on . . . the effective date of the zoning regulation, the use of this property was not that of a trailer court. The use of the property standing alone on that date would not make known to the neighborhood

Honorable Milt Harper

that the land was being used as a trailer court, . . . In any substantial sense there was no construction or direct adaptability of the land for the intended purpose, and no employment of the land within the intended purpose. The defendants had not engaged in substantial construction nor incurred substantial liabilities directly relating to the establishment of a trailer park as a nonconforming use. . . . [E]very thing that was actually done or performed on the property . . . and every use that was actually made of the property up to that date could be referred to as a conforming use just as well as it could be referred to as a nonconforming use. . . ." 155 N.W.2d at 320-321.

CONCLUSION

It is the opinion of this office that the platting and recording of a subdivision is not sufficient use and maintenance of existing property so as to exempt it from changes in county zoning requirements, §§64.850-64.895, RSMo.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Louren R. Wood.

Very truly yours,

A handwritten signature in black ink, appearing to read "John Ashcroft", written in a cursive style.

JOHN ASHCROFT
Attorney General

Attorney General of Missouri

JOHN ASHCROFT
ATTORNEY GENERAL

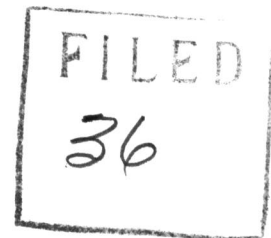
JEFFERSON CITY
65101

(314) 751-3321

January 10, 1978

OPINION LETTER NO. 36
Answer by letter-Allen

Mr. Stephen C. Bradford
Commissioner of Administration
Office of Administration
Room 125, State Capitol Building
Jefferson City, Missouri 65101



Dear Mr. Bradford:

This is in response to your request for an opinion of this office asking whether the Office of Administration can implement a self-insurance program under authorization of Sections 105.800 through 105.830, RSMo 1969, and in order to implement such a program is there any further authorization required from any agency, entity, or person.

It is our belief that this question was answered previously in Opinion Letter No. 75 dated November 23, 1976, to J. Neil Nielson, former Commissioner of Administration. I am attaching a copy of that opinion letter plus Opinion No. 72, 1971, and Opinion Letter No. 94, 1974, relating to workmen's compensation and self-insurance within various divisions and agencies of this state.

To the extent that the head of an executive department and constitutional agency exercises the option to self-insure in the best interest of the state, then it appears that that agency can engage in the self-insurance program. However, the option is to be exercised by the head of the executive department or constitutional agency as the case may be. The explanation as to each agency and its opportunity to exercise options to become self-insured or to carry workmen's compensation insurance is covered in the opinions which are submitted herewith.

Mr. Stephen C. Bradford

We also note that according to Opinion Letter No. 75 the Omnibus Reorganization Act of 1974 did not change the statutory requirements concerning insurance or self-insurance of state agencies under Sections 105.800 through 105.830.

According to your opinion request, your office has determined that a program of self-insurance for workmen's compensation benefits is in order for governmental agencies and entities to create a savings of taxpayers' dollars. We believe it would be proper for your office to discuss this with the state agencies which are permitted to self-insure and evaluate the possibilities of your proposal.

Yours very truly,

JOHN ASHCROFT
Attorney General

Enclosures: Op. Ltr. No. 75
Nielsen, 11-23-76

Op. No. 72
Eads, 2-23-71

Op. Ltr. No. 94
Shaffer, 3-29-74

Attorney General of Missouri

JOHN ASHCROFT
ATTORNEY GENERAL

JEFFERSON CITY

(314) 751-3321

65101

January 10, 1978

OPINION LETTER NO. 37

Mrs. Carolyn Ashford, Director
Department of Natural Resources
1014 Madison Street
Jefferson City, Missouri 65101

Dear Mrs. Ashford:

This is in response to your question:

"Does the Missouri Air Conservation Commission have the authority under Chapter 203, RSMo, to compel air contaminant sources to disclose to the agency the types of information referred to in the attached letter from the Regional Administrator of the United States Environmental Protection Agency? Specifically, can the agency compel a source to disclose process descriptions and production data for operations which result in the emission or potential emission of air contaminants, and can the agency compel a source which is burning natural gas to disclose gas shortage projections, alternate fuel needs, expected increases in air contaminant emissions from alternate fuels, and the other information referred to on page one of the EPA letter?"

The EPA letter which you reference informs the state agency that certain information developed by the Federal Energy Administration with respect to the natural gas supply situation, can be made available to the state agency only if the conditions of 40 C.F.R. §2.301(h)(3), relating to the disclosure of confidential business information, are met. The same stipulation applies to the disclosure to the state of process descriptions and production data acquired by EPA personnel during inspections of air contaminant sources.

Mrs. Carolyn Ashford

40 C.F.R. §2.301(h) (3) provides that so-called confidential business information can be disclosed to the states only if one of two conditions are met. Your question goes to the first condition, which is:

"The agency has first furnished to the EPA office having custody of the information a written opinion from the agency's chief legal officer or counsel stating that under applicable state or local law the agency has the authority to compel a business which possess such information to disclose it to the agency, . . ." 40 C.F.R. §2.301(h) (3) (i).

The resolution of your question will necessarily provide the opinion called for in the federal regulation.

Section 203.050.1, RSMo Supp. 1975, provides that the Air Conservation Commission has the following powers, inter alia:

"(3) (a) To require persons engaged in operations which result in air pollution to file reports containing information relating to rate, period of emission and composition of effluent;

*

*

*

"(8) Develop such facts and make such investigations as are consistent with the purposes of sections 203.020, 203.040 to 203.100, 203.120, 203.140 to 203.170 and 203.190 and 203.195, and, in connection therewith, to enter or authorize any representative of the commission to enter at all reasonable times and upon reasonable notice in or upon any private or public property for the purpose of inspecting or investigating any condition which the commission or executive secretary shall have probable cause to believe to be an air contaminant source. . ."

The quoted passages from Section 203.050.1 appear to be a broad grant of authority to acquire facts relevant to the prevention, abatement and control of air pollution, the stated goal of the Air Conservation Law. Section 203.030, RSMo 1969. Moreover, the authority expressly conferred by Section 203.050.1 is enhanced by the doctrine of implied powers. An administrative agency not only has those powers expressly granted, but also by implication,

Mrs. Carolyn Ashford

such additional powers as are necessary for the due and efficient exercise of the powers expressly granted, or as may be fairly implied from the statute granting the express powers. State on inf. McKittrick v. Wymore, 132 S.W.2d 979 (Mo. Banc 1939). A statutory grant of power carries with it, by implication, everything necessary to carry out the power and make it effectual and complete. Id.

With respect to the first category of information mentioned in your question, process descriptions and production data, it is our opinion that the Air Conservation Commission can compel air contaminant sources to disclose such information. The specific grant of authority in Section 203.050.1(3)(a) refers to reports relating to "rate, period of emission and composition of effluent." However, it is obvious that such authority would be less effective if the agency could not check the accuracy of the information relating to rate, period and composition of emissions by reference to the production method and related data. We are also aware that the rate, period and composition of some air pollution emissions cannot be readily determined except by calculations based on production methods, rates and raw materials. Therefore, in order to carry out the statutory mandate to prevent, abate and control air pollution, the power to require submission of process descriptions and production data by air contaminant sources is necessarily implied from the power to require submission of information relating to rate, period and composition of emissions.

Moreover, the agency can require some information respecting process descriptions and production data in another way, irrespective of the desire of the source to disclose such information. According to the EPA letter, the subject information is being obtained by EPA personnel as they inspect air contaminant sources. Representatives of the Air Conservation Commission also have the power to inspect sources, and, if necessary, to obtain search warrants in aid thereof. Section 203.050.1(8). Thus, the agency inspectors can, for all practical purposes, compel the source to disclose such information by compelling the source to submit to the inspection.

With respect to the second category of information referenced in your question, data relating to the current natural gas shortage and its effect on air contaminant emissions, we are also of the opinion that the Air Conservation Commission can compel disclosure of such information by the affected sources. Disclosure of data relative to increased emissions of air contaminants, due to fuel switching, can obviously be compelled under the express authority to require disclosure of rate, period and composition of the effluents. Section 203.050.1(3)(a). Plant by plant projection of gas shortages and alternate fuel needs is the sort of ancillary information which the agency necessarily must have in order to make the emission increase data meaningful. Thus, the agency, by necessary implication, has the authority to compel the disclosure of such information.

Mrs. Carolyn Ashford

The other information referred to in the EPA letter are such things as number and type of combustors at each plant, the firing rate of such combustors, the name and address of the source and its parent company, SIC (Standard Industrial Classification) Codes, and Federal Energy Administration identification numbers. This data appears to be the sort of information the agency would require in order to double-check the accuracy of emission data submitted by the source. Thus, such information would be necessary to the effective administration of the regulatory program. The Air Conservation Commission has the implied power to compel disclosure of such information, in order to carry out the powers expressly granted to the agency by the legislature.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John Ashcroft", with a long, sweeping horizontal line extending to the right.

JOHN ASHCROFT
Attorney General



JOHN ASHCROFT
ATTORNEY GENERAL

Attorney General of Missouri

JEFFERSON CITY

65101

July 19, 1978

(314) 751-3321

OPINION LETTER NO. 39

Mr. Jack M. Keene, Director
Department of Labor and
Industrial Relations
421 East Dunklin
Jefferson City, Missouri 65101

Dear Mr. Keene:

This letter is issued in response to your request for an opinion as to whether or not an individual employed under Chapter 36, RSMo, known as the State Merit System Law, can hold the position of "national committeeman" in a political club. In particular, you have directed our attention to the provisions of Section 36.150.5, RSMo Supp. 1975, which states in pertinent part as follows:

"No employee selected under the provisions
of this law shall be a member of any national,
state or local committee of a political party,
or an officer of a partisan political club.
. . . ."

In response to our request for additional information we were advised that the position in question is that of national committeeman or national committeewoman on the National Committee of the Young Democrats of America as a representative of the Young Democratic Clubs of Missouri, Inc. We were also provided with copies of the Constitution and Bylaws of the Young Democratic Clubs of Missouri, Inc. and of the Young Democrats of America.

It is apparent from reading these documents that the clubs in question must be considered partisan political clubs. Among other things, the Constitution of the Young Democratic Clubs of Missouri states that "it shall be the policy of this organization

Mr. Jack M. Keene

in all of its endeavors to contribute to the growth and influence of the Democratic Party. . . ."

Likewise, the Constitution of the Young Democrats of America states that one of the purposes of the organization is to "promote the policies and practices which are consistent with the highest principles of the Democratic Party. . . ."

Under the provisions of Section 36.150.5, the question then becomes one of whether an individual holding a position as a national committeeman or committeewoman on the National Committee of the Young Democrats of America as a representative of the Young Democratic Clubs of Missouri, Inc., could be considered an "officer" of these clubs. In reviewing the Constitution of the Young Democratic Clubs of Missouri, we note that national committeemen and national committeewomen are deemed to be state officers of the organization. Article 4, Section 1 of the Constitution of the Young Democratic Clubs of Missouri, page 3. Under the provisions of Article 3, Section 2 of the Constitution of the Young Democrats of America, page 5, the national committeeman or committeewoman from each charter unit is also a member of the National Committee which serves as the governing body of the Young Democrats of America.

In view of this, it is our opinion that an individual holding such a position must be considered "an officer of a partisan political club". Such a person under the provisions of Chapter 36, the State Merit System Law, would be in violation of Section 36.150.5.

Very truly yours,

A handwritten signature in black ink, appearing to read "John Ashcroft", with a stylized flourish at the end.

JOHN ASHCROFT
Attorney General

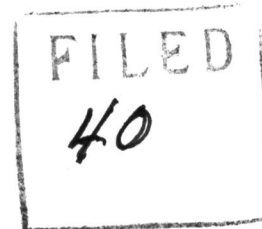
PROSECUTING ATTORNEY:
CRIMINAL PROCEDURE:
CRIMINAL LAW:

The county prosecuting attorneys are authorized under the law of this state to exercise discretion in determining whether or not to prosecute on the basis of a criminal complaint, so long as such discretion is exercised fairly, in good faith and in accordance with established principles of law.

OPINION NO. 40

January 19, 1978

Honorable Milton Harper
Prosecuting Attorney
Boone County Courthouse
Columbia, Missouri 65201



Dear Mr. Harper:

This opinion is in answer to your question asking:

"Whether a prosecuting attorney is without discretion and must file a criminal charge under Sec. 545.250 when a citizen demands to file a misdemeanor or felony against another citizen. (It is assumed that the prosecuting attorney has refused to file such charge as his legal opinion is that no charges are supportable by the evidence.)"

Section 545.250, RSMo 1969, provides that any person having knowledge of the commission of a crime may file a sworn affidavit stating the relevant facts with a competent court or with the prosecuting attorney, "and it shall be the duty of the prosecuting attorney to file an information, as soon as practicable, upon said affidavit, as directed in section 545.240." However, it is the opinion of this office that the above may not be construed to deprive the county prosecuting attorneys of a degree of discretion in determining whether or not a given criminal complaint warrants prosecution.

This conclusion is amply supported by the decisional law of this state. The Missouri Supreme Court has held as early as 1939 that the prosecuting attorney has the duty under Section 545.240 "to make a reasonable investigation and then determine if an information should be filed" (emphasis supplied),

Honorable Milton Harper

State on Inf. McKittrick v. Wymore, 132 S.W.2d 979, 988 (Mo. banc 1939), and it is now a "well-established legal principle that it is within the sole discretion of the prosecuting attorney concerning against whom, when and how the criminal laws are to be enforced." State ex rel. Lodwick v. Cottey, 497 S.W.2d 873, 880 (Mo.Ct.App. at KC. 1973).

" . . . Of necessity a prosecuting attorney is charged with the responsibility and vested by law with the discretion and legal duty to investigate the facts and the applicable law and to himself determine when a prosecution should be initiated. And by token of the same reasoning we think the discretion vested in him by law places in him the sole power to determine when he should proceed with a prosecution or dismiss it." State ex rel. Griffin v. Smith, 258 S.W.2d 590, 594 (Mo.banc 1953).

"The same rule is reflected in the frequently stated principle that the prosecuting attorney has the sole and exclusive discretion concerning whether or not to enter a nolle prosequi (citations omitted)." State ex rel. Lodwick v. Cottey, *supra*, at 880. See also State ex Inf. Dalton v. Moody, 325 S.W.2d 21, 32 (Mo.banc 1959); State ex rel. Dowd v. Nangle, 276 S.W.2d 135, 137-138 (Mo.banc 1955); State on Inf. McKittrick v. Wymore, *supra*, at 988. It is clear that, without such discretion, the prosecutor could be compelled to bring frivolous prosecutions, contrary to his ethical responsibilities under DR 7-103(A) of Supreme Court Rule 4. That section states that "A public prosecutor . . . shall not institute or cause to be instituted criminal charges when he knows or it is obvious that the charges are not supported by probable cause." See also EC 7-4, 7-5 and 7-13 of Supreme Court Rule 4.

The scope of the prosecutor's discretion has been defined on several occasions by the Missouri courts.

" . . . ' [The prosecutor's] duties of necessity involve a good faith exercise of the sound discretion of the prosecuting attorney. "Discretion" in that sense means power or right conferred by law upon the prosecuting officer of acting officially in such circumstances, and upon each separate case, according to the dictates of his own judgment and conscience

Honorable Milton Harper

uncontrolled by the judgment and conscience of any other person. Such discretion must be exercised in accordance with established principles of law, fairly, wisely and with skill and reason. It includes the right to choose a course of action or non-action, chosen not willfully or in bad faith, but chosen with regard to what is right under the circumstances. Discretion denotes the absence of a hard and fast rule or a mandatory procedure regardless of varying circumstances. That discretion may, in good faith (but not arbitrarily), be exercised with respect to when, how and against whom to initiate criminal proceedings (Citations omitted). . . ." State on Inf. McKittrick v. Wallach, 182 S.W.2d 313, 319 (Mo.banc 1944).

Similarly, it has been stated that the prosecutor's exercise of his discretion must be "in good faith" and "honest," State on Inf. McKittrick v. Wymore, supra, at 987, and not "arbitrary." State on Inf. McKittrick v. Graves, 144 S.W.2d 91, 95 (Mo.banc 1940). While this determination rests upon the facts present in each case, it should be noted that a prosecutorial abuse of discretion has been found in only two instances in the judicial history of this state: in State on Inf. McKittrick v. Wymore, supra, the court found that the respondent, the Prosecuting Attorney of Cole County, failed to investigate or prosecute widespread gambling activities involving slot and pinball machines and similar devices, despite the fact that these activities were open and notorious, and that respondent had repeatedly received actual notice and detailed descriptions of the locations and the specific misconduct involved. The Missouri Supreme Court, stating that "it is not conceivable that men in control [of the gambling operations] would 'plaster' the city with machines unless they had an understanding with the prosecuting attorney and other law-enforcement officers," found respondent guilty of official misconduct and ousted him from office. Id. at 985. In State on Inf. McKittrick v. Graves, supra, similar charges were cause for the removal of the Jackson County Prosecuting Attorney, to the effect that he either failed to prosecute or nolle prossed numerous "open and flagrant" violations of the law, including gambling, election fraud and assault. The court held that the respondent's failure to investigate many apparently meritorious complaints and his "arbitrary" failure to go forward in many such prosecutions constituted an abuse of discretion.

Honorable Milton Harper

Id. at 95. Cf. State v. Smith, 422 S.W.2d 50, 66-67 (Mo.banc 1967); State ex Inf. Dalton v. Moody, supra; State on Inf. McKittrick v. Wallach, supra.

CONCLUSION

It is the opinion of this office that the county prosecuting attorneys are authorized under the law of this state to exercise discretion in determining whether or not to prosecute on the basis of a criminal complaint, so long as such discretion is exercised fairly, in good faith and in accordance with established principles of law.

The foregoing opinion, which I hereby approve, was prepared by my assistant, John M. Morris.

Very truly yours,

A handwritten signature in black ink, appearing to read "John Ashcroft", with a long horizontal stroke extending to the right.

JOHN ASHCROFT
Attorney General

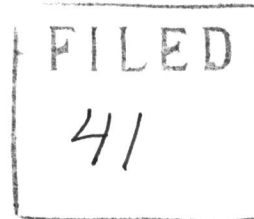
GOVERNOR:
PARDONS:

The Governor of the State of Missouri may partially pardon an offender so that the recipient will remain subject to the second offender provisions contained in Section 556.280, RSMo.

OPINION NO. 41

January 30, 1978

Honorable Joseph P. Teasdale
Governor of Missouri
Executive Office
Capitol Building
Jefferson City, Missouri 65101



Dear Governor Teasdale:

This is in response to your request for an opinion from this office concerning the authority of the governor to issue partial pardons, the recipient of which pardon would be restored to all rights of citizenship which were forfeited as a result of his conviction except that he would still be subject to the punishment provisions of Section 556.280, commonly known as the Second Offender Act.

The governor's power to pardon is derived from Article IV, §7, Constitution of Missouri, which reads in pertinent part as follows:

"The governor shall have power to grant reprieves, commutations and pardons, after conviction, for all offenses except treason and cases of impeachment, upon such conditions and with such restrictions and limitations as he may deem proper, subject to provisions of law as to the manner of applying for pardons."

Initially, one must differentiate between the various types of pardons because the courts often neglect to note any distinctions:

Honorable Joseph P. Teasdale

". . . There are several kinds of pardons; thus a pardon may be full or partial, absolute or conditional. A pardon is full when it freely and unconditionally absolves the person from all the legal consequences of his crime and of his conviction, direct and collateral, including the punishment, whether of imprisonment, pecuniary penalty, or whatever else the law has provided; it is partial where it remits only a portion of the punishment or absolves from only a portion of the legal consequences of the crime. A pardon is absolute where it frees the criminal without any condition whatever; and it is conditional where it does not become operative until the grantee has performed some specified act, or where it becomes void when some specified event transpires."
67 C.J.S. Pardons, §1 (1950).

And, it was held by the United States Supreme Court in Ex parte Wells, 59 U.S. (18 How.) 308, 15 L.Ed. 421, 423 (1855) that:

". . . Time out of mind, in the earliest books of the English law, every pardon has its particular denomination. They are general, special or particular, conditional or absolute, statutory, not necessary in some cases, and in some grantable of course. . . ."

Clearly, Article IV, §7, allows a governor to freely place limitations or restrictions upon any pardon he decides to grant, provided these conditions are not "illegal, immoral, or impossible of performance. . . ." Ex parte Webbe, 322 Mo. 859, 30 S.W.2d 612, 615 (Mo.Banc 1929). The governor has the exclusive power to pardon and this power may not in any way be limited by the judicial or legislative branches of government. Ex parte Thornberry, 300 Mo. 661, 254 S.W. 1087, 1090 (Mo. Banc 1923); Lime v. Blagg, 131 S.W.2d 583, 586 (Mo. Banc 1939).

It should be noted that neither Missouri case law nor Missouri statutory law contain the term "partial pardon." However, the broad language of Article IV, §7, indicates that the governor may limit a pardon.

Honorable Joseph P. Teasdale

Section 556.280, RSMo 1969, provides in pertinent part:

"If any person convicted of any offense punishable by imprisonment in the penitentiary, or of any attempt to commit an offense which, if perpetrated, would be punishable by imprisonment in the penitentiary, shall be sentenced and subsequently placed on probation, paroled, fined or imprisoned therefor, and is charged with having thereafter committed a felony, he shall be tried and if convicted punished as follows:

"(1) If the subsequent offense be such that, upon a first conviction, the offender could be punished by imprisonment in the penitentiary, then the person shall receive such punishment provided by law for the subsequent offense as the trial judge determines after the person has been convicted.

"(2) Evidence of the prior conviction, sentence and subsequent imprisonment or fine, parole, or probation shall be heard and determined by the trial judge, out of the hearing of the jury prior to the submission of the case to the jury, and the court shall enter its findings thereon. If the finding is against the prior conviction, sentence and subsequent imprisonment or fine, parole or probation, then the jury shall determine guilt and punishment as in other cases."

The holdings in State v. Asher, 246 S.W. 911 (Mo. 1922); State ex rel. Stewart v. Blair, 203 S.W.2d 716 (Mo. Banc 1947); and State v. Durham, 418 S.W.2d 23 (Mo. 1967), stood for the proposition that if a defendant is pardoned after conviction, he remained subject to punishment as an habitual criminal if he later committed a criminal offense. However, the Missouri Supreme Court in Guastello v. Department of Liquor Control, 536 S.W.2d 21, 25 (Mo. Banc 1976), specifically ruled that the holdings in Asher, Blair and Durham should no longer be followed to the extent they conflict with the opinion in

Honorable Joseph P. Teasdale

Guastello. In Guastello, the court stated, "It would seem apparent that if a defendant is pardoned after conviction and, . . . that conviction is thereby obliterated, such 'obliterated conviction' could not be used as the basis for subjecting defendant to the Habitual Criminal Act if he later committed a criminal offense." Guastello v. Department of Liquor Control, supra, at 23-25.

Regardless of the rather sweeping language concerning an "obliterated conviction," a careful reading of Guastello reveals that the court was considering the effects of a full pardon while making no mention of the partial pardon on sentencing of an habitual offender. The court merely defined the effect of a full pardon, and in no way limited the governor's ability either to conditionally or partially pardon an offender.

Any partial pardon should state that it is a partial pardon and clearly define its scope. We do not, in this opinion, pass upon the propriety of any particular form of pardon to be used. However, we will provide legal assistance to your office for such drafting.

CONCLUSION

It is the opinion of this office that the Governor of the State of Missouri may partially pardon an offender so that the recipient will remain subject to the second offender provisions contained in Section 556.280, RSMo.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Carson Elliff.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John Ashcroft", with a long, sweeping horizontal line extending to the right.

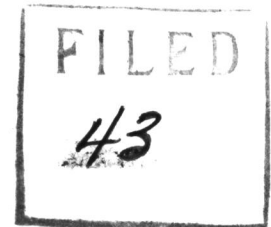
JOHN ASHCROFT
Attorney General

SCHOOLS: (1) Neither a school district nor the
SCHOOL DISTRICTS: State Department of Elementary and Sec-
ondary Education may deny access to the
educational records of a handicapped or severely handicapped child
by a validly authorized representative of the child's parent or
guardian. (2) This office will not render an opinion on the ques-
tion of unauthorized practice of law, deferring to the Missouri Bar
Advisory Committee.

OPINION NO. 43

December 14, 1978

Honorable Della M. Hadley
Representative, District 31
7345 Belleview
Kansas City, Missouri 64114



Dear Representative Hadley:

This opinion is in response to your questions asking:

"1) Does either a local school district
or the State Department of Education have
statutory authority to preclude a repre-
sentative of the parent from examining the
record on the basis that district policy
allowing only a parent to examine the rec-
ords establishes full compliance with the
above-mentioned statutes?

"2) Does representation of a parent by
someone other than an attorney constitute
practicing law without a license?"

The context in which your questions are asked involves the
provision of special educational services to handicapped and
severely handicapped children in Missouri. The laws governing
this subject emanated first from state statutes (§§ 162.960-
162.995, RSMo Supp. 1975, as amended) and later from federal
statutes (20 U.S.C. 1401, et seq.) and regulations promulgated
thereunder by the Department of Health, Education, and Welfare
(45 C.F.R. Part 121a). The federal statutes and regulations are
applicable in Missouri by virtue of federal special education
funds received by the state and its school districts.

Section 162.963 (1), RSMo Supp. 1977, provides:

Honorable Della M. Hadley

"1. At any hearing held pursuant to the provisions of this act the parent or guardian or his representative shall be entitled to examine and cross-examine witnesses, to introduce evidence, to appear in person, and to be represented by counsel. Prior to the hearings, the parent or guardian or his representative shall have access to any reports, records, clinical evaluations or other materials upon which the action to be reviewed was wholly or partially based which could reasonably have a bearing on the correctness of the determination."

The hearings referred to in the above-quoted sections are those provided for in Sections 162.950, RSMo Supp. 1975, and 162.961, RSMo Supp. 1977, which allow the parent a right to contest the diagnosis, evaluation, or assignment of a child requiring or thought to require special educational services.

It is therefore clear under the terms of Section 162.963 that school officials must permit a representative of the parent to inspect and review the educational records of a handicapped child in connection with the parent's exercise of the right to a hearing.

A question remains, however, as to the right of a representative of the parent to inspect a handicapped child's educational records in a situation where no hearing has been requested, or perhaps where review of the records is sought in order to decide whether or not to request a hearing. Section 162.945, RSMo Supp. 1977, provides that the parent shall be notified of the results of any diagnosis, evaluation, assignment, or denial of assignment involving children who are handicapped or severely handicapped, and that the notice shall:

". . . advise the parent or guardian that, upon request, the parent or guardian shall be permitted to inspect, at the school attended by the child or at another convenient place at any time during regular school hours, all records pertaining to said child . . ."

While this section is silent as to the rights of a representative of the parent to review the child's records, the provisions of 45 C.F.R. § 121a.562 (b) (3) expressly state:

"(a) Each participating agency shall permit parents to inspect and review

Honorable Della M. Hadley

any education records relating to their children which are collected, maintained, or used by the agency under this part.

. . .

"(b) The right to inspect and review education records under this section includes:

. . .

(3) The right to have a representative of the parent inspect and review the records."

By virtue of their receipt of federal funds under 20 U.S.C. 1401, et seq., school districts and the State Department of Elementary and Secondary Education would be bound thereby. Of course, proper authorization from the parent should be provided before school authorities make a child's records available to a representative.

Your second question asks whether representation of a parent by someone other than an attorney constitutes the practice of law without a license.

The policy of this office is to refrain from answering questions related to the unauthorized practice of law. Missouri Supreme Court Rules 5.05 and 5.06 provide that the Missouri Bar Advisory Committee shall have the power and is charged with the duty on behalf of the Bar to investigate the unauthorized practice of law and to give opinions as to the interpretation of rules involving unauthorized practice. For this reason, we respectfully refer you to that body for guidance.

CONCLUSION

Based on the foregoing, it is the opinion of this office that:

(1) Neither a school district nor the State Department of Elementary and Secondary Education may deny access to the educational records of a handicapped or severely handicapped child by a validly authorized representative of the child's parent or guardian.

(2) This office will not render an opinion on the question of unauthorized practice of law, deferring to the Missouri Bar Advisory Committee.

Honorable Della M. Hadley

The foregoing opinion, which I hereby approve, was prepared by my assistant, Sheila K. Hyatt.

Very truly yours,

A handwritten signature in cursive script, reading "John Ashcroft", with a long horizontal flourish extending to the right.

JOHN ASHCROFT
Attorney General

Attorney General of Missouri

JOHN ASHCROFT
ATTORNEY GENERAL

JEFFERSON CITY

65101

(314) 751-3321

August 2, 1978

OPINION LETTER NO. 44

Honorable Larry M. Burditt
Prosecuting Attorney, Benton County
P. O. Box 788
Warsaw, Missouri 65355

Dear Mr. Burditt:

This letter is in response to your question asking as follows:

"The Deputy County Clerk of Benton County has never received the additional \$1,000.00 salary set out in Section 51.450, Subparagraph 3. She has been paid 65 percent of the Clerk's salary as determined in Section 51.450, Paragraph 1(2). The question upon which this opinion is requested is: Is she now entitled to the back pay which she admittedly has not received and if so, for how many years is she entitled to it?"

You also state:

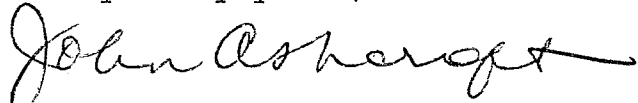
"When I took office in January of 1977, apparently the County Clerk in figuring his budget had come across the provisions of Section 51.450 and realized that his deputy had never been paid the full amount to which she was entitled. He then asked me to compute her salary and discuss it with the County Court. I did this, and I believe for the year 1977 she is obtaining

Honorable Larry M. Burditt

65 percent of the Clerk's salary, as provided for in Section 51.450, plus the \$1000. The County Court asked what it should do about past years, and I told them that I felt they owe her the \$1000.00 for the last five years based upon the statute of limitations found in Section 516.120. I heard nothing further about this until the auditors appeared in our county and the County Clerk asked them what to do. They informed him that an Attorney General's opinion was necessary, and apparently the County Court and the County Clerk and his deputy have agreed to abide by any decision handed down by the Office of the Attorney General."

You have not furnished us with precise facts, therefore we do not assume that there has been an underpayment. However, if there is in fact an underpayment the applicable statute of limitations under Section 516.120, RSMo, would be five years. See our Opinions No. 127-1974 and No. 241-1965, copies enclosed.

Very truly yours,



JOHN ASHCROFT
Attorney General

Enclosures:

- Op. No. 127-1974, Stephenson
- Op. No. 241-1965, Bollinger

Attorney General of Missouri

JOHN ASHCROFT
ATTORNEY GENERAL

JEFFERSON CITY
65101

(314) 751-3321

March 13, 1978

OPINION LETTER NO. 46

Honorable Douglas Boschert
State Representative, District 52
Room 102B, Capitol Building
Jefferson City, Missouri 65101

Dear Mr. Boschert:

This is in answer to your recent opinion request in which you ask whether a petition to audit the Cooperating School Districts of the St. Louis Suburban Area, Inc. needs a petition signed by five percent of the voters in the last gubernatorial election from one participating school district, or a petition signed by five percent of the voters in each of the school districts in order to compel an audit by the state auditor.

It is our view that it is unnecessary to answer the question you asked because we believe that the Cooperating School Districts of the St. Louis Suburban Area, Inc. is not a "political subdivision of the state" as such term is used in Section 29.230, RSMo, providing for an audit by the state auditor when requested to do so by a petition signed by five percent of the qualified voters of the political subdivision.

It is our understanding that the Cooperating School Districts of the St. Louis Suburban Area, Inc. is a private not-for-profit corporation. We believe that Opinion No. 21, rendered January 19, 1976, to State Auditor George W. Lehr, a copy of which we enclose, is applicable. Such opinion holds that the state auditor is not authorized to audit the Kansas City Philharmonic Association which is a private not-for-profit corporation. We believe that the principles enunciated in such opinion are applicable here and that Section 29.230 does not authorize the state

Honorable Douglas Boschert
Page 2

auditor to audit the Cooperating School Districts of the St. Louis Suburban Area, Inc., a private not-for-profit corporation.

This result is mandated by the law as it presently exists. I share your concern that governmental activity should be open to the public no matter what agency or organization conducts it. I would be glad to assist you in drafting legislation if you desire.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John Ashcroft", with a stylized flourish at the end.

JOHN ASHCROFT
Attorney General

Enclosure: Op. No. 21
1/19/76, Lehr

Attorney General of Missouri

JOHN ASHCROFT
ATTORNEY GENERAL

JEFFERSON CITY

65101

(314) 751-3321

June 23, 1978

OPINION LETTER NO. 47

Honorable Thomas M. Keyes
State Auditor
State Capitol Building
Jefferson City, Missouri 65101

Dear Mr. Keyes:

This letter is in response to your request for an opinion on the following questions:

- "1. Do the sale and repurchase transactions entered into between Parkway School District and Laclede Gas Company in 1972 violate any provisions of the Missouri Constitution or statutes? If so, what is the effect of any such violations?
- "2. Should the unpaid balance of the purchase price owed by Parkway School District to Laclede Gas Company pursuant to the repurchase agreements be counted as indebtedness in determining the amount of bonds Parkway School District may issue without violating the Constitutional and statutory limitation on debt?"

Apparently Parkway School District sold its heating and cooling equipment located at West Junior High School and Clayton Woods School to Laclede Gas Company in 1972. Parkway then leased back the equipment under an agreement for the purchase of an undivided interest in the heating and cooling equipment supplied by Laclede Gas Company and utilized by the Parkway School District. The total purchase price in connection with both schools within the district was

Honorable Thomas M. Keyes

\$800,000. Parkway School District is a six-director school district, and the purchase of the equipment was not approved by the voters in the school district but was approved by the Board of Education.

At the outset, applicable provisions of law include Section 432.070, RSMo 1969, which provides:

"No county, city, town, village, school township, school district or other municipal corporation shall make any contract, unless the same shall be within the scope of its powers or be expressly authorized by law, nor unless such contract be made upon a consideration wholly to be performed or executed subsequent to the making of the contract; and such contract, including the consideration, shall be in writing and dated when made, and shall be subscribed by the parties thereto, or their agents authorized by law and duly appointed and authorized in writing." (Emphasis added)

Also in part Section 177.011, RSMo 1969, provides:

". . . No board shall lease or rent any building for school purposes while the district schoolhouse is unoccupied, and no schoolhouse or school site shall be abandoned or sold until another site and house are provided for the school district."

Also Section 177.091, RSMo 1969, which was in effect on July 24, 1972, provides in part:

"4. If there is within the district any school property that is no longer required for the use of the district, the board, by an affirmative vote of a majority of the whole board, may authorize and direct the sale of the property. The sale, unless it is to a public institution of higher education, shall be to the highest bidder and notice that the board is holding the property for sale shall be given by publication in a newspaper within the county in which all or a part of the district is located which has general circulation within the district, once a week for two consecutive weeks, the last publication to be at

Honorable Thomas M. Keyes

least seven days prior to the sale of the property. The deed of conveyance shall be executed by the president and attested by the secretary of the board. If the district has a seal, it shall be affixed to the deed. The proceeds derived from the sale shall be placed to the credit of the building fund of the district."

Article VI, Section 26a, Missouri Constitution, 1945, provides:

"No county, city, incorporated town or village, school district or other political corporation or subdivision of the state shall become indebted in an amount exceeding in any year the income and revenue provided for such year plus any unencumbered balances from previous years, except as otherwise provided in this Constitution."

It occurs to us that there is no specific statute providing for the sale and leasing back of heating and cooling equipment by Parkway School District to Laclede Gas Company. In effect, Parkway has transferred title to a complete heating and cooling system in two schools within its district to a third party for the purpose of raising money since the district was low on cash at the time of the transactions. The heating and cooling system is an integral part of the school buildings. Moreover, to permit such transactions as this now or in the future would be to permit school districts to finance its debts by gradually selling off pieces of various school buildings. There is no statute or law that contemplates such a transaction.

Moreover, to the extent that school property is no longer required for use by the board, the property may be sold. This is done pursuant to Section 177.091 and must be accomplished through public bid. While this section apparently relates to real property, it is obvious that the heating and cooling equipment constitutes fixtures and are an integral part of the school building. Without such equipment, the school building would be virtually useless.

It has been suggested that previous opinions of this office support the transaction described above between Parkway School District and Laclede Gas Company. It has been suggested that Opinion No. 103 issued July 19, 1971, to Manford permits such transaction. While the opinion holds that a six-director school district, which has exhausted its working capital or anticipates such exhaustion in the near future, has the power without obtaining voter approval to borrow money to meet its current operating expenses

Honorable Thomas M. Keyes

provided its unencumbered anticipated revenue for the calendar year is sufficient at the time the loan is made to repay the principal and interest on the debt, Opinion No. 103 does not hold that the district through the school board can sell heating and cooling equipment in its schools to a third party and thereafter lease the same back for twenty years with interest. Nor do any of the opinions relied on by attorneys representing the district and cited in the correspondence which you transmitted to this office stand for the proposition that Parkway School District may enter into transactions such as this.

Having fully considered the issue and decided that such transaction violates the statutes of this state, we find it unnecessary to determine whether the constitutional provisions are also violated. We do conclude that the contract between Parkway School District and Laclede Gas Company is void. We further find it unnecessary to answer your second question since, if the transaction is void, no debt is created.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John Ashcroft", with a long horizontal flourish extending to the right.

JOHN ASHCROFT
Attorney General

Attorney General of Missouri

JOHN ASHCROFT
ATTORNEY GENERAL

JEFFERSON CITY

65101

(314) 751-3321

March 23, 1978

OPINION LETTER NO. 49

Honorable Kaye Steinmetz
State Representative, District 57
c/o House Post Office
State Capitol Building
Jefferson City, Missouri 65101

Dear Representative Steinmetz:

This letter is in response to your question asking whether the board of directors of the Florissant Valley Fire Protection District are authorized to discontinue collection of the ambulance tax without a vote of the taxpayers of the district.

It is our understanding from the facts you present to us that the emergency ambulance service was authorized under Section 321.620, RSMo 1969. Such section has now been repealed and has been re-enacted as Section 321.620 by the laws of 1977.

Your question asks whether the district can do away with the five cent tax which has been levied pursuant to the repealed section and presumably abandon the ambulance service authorized by the voters.

The district was authorized by the voters to levy a tax up to five cents on the one hundred dollars assessed valuation. The district is not required to levy the maximum five cent tax however, and may levy a lesser tax if such lesser tax would raise sufficient revenue to provide ambulance service. However, we note that the repealed section contained the provision stating that if a majority of the qualified voters casting votes

Honorable Kaye Steinmetz

in such election be in favor of emergency ambulance service and the levy, the district "shall forthwith commence such service." The same provision is continued in the present Section 321.620.

We are of the view that such provision applies to such elections held both at the submission by the board of directors or by petition of voters and therefore the effect of such provisions is not dependent upon whether the proposition to establish an ambulance service was originally submitted as a result of a petition by the voters or by the board of directors.

We find no statutory authority for terminating such ambulance service. Senate Bill No. 198, First Regular Session, 79th General Assembly, does provide for the dissolution of certain special purpose districts. However, such dissolution procedure, in our view, is not applicable to the discontinuance of such authorized ambulance service.

Clearly a governmental unit that has been created may not be dissolved by any means other than a procedure established for that purpose. State v. Crismon, 188 S.W.2d 937 (Mo.Banc 1945).

Therefore, we conclude that while the district is not required to levy the maximum authorized five cent tax it is required to furnish emergency ambulance service.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John Ashcroft", with a long horizontal flourish extending to the right.

JOHN ASHCROFT
Attorney General

Attorney General of Missouri

JOHN ASHCROFT
ATTORNEY GENERAL

JEFFERSON CITY

65101

(314) 751-3321

March 15, 1978

OPINION LETTER NO. 50

Honorable Harold F. Reisch
Representative, District 110
Room 203C, State Capitol Building
Jefferson City, Missouri 65101

Dear Representative Reisch:

This is in response to your request concerning the following question:

"Is the Missouri State Council on the Arts, as created by Section 185.010 RSMo. 1969, complying with its statutory duties, powers and responsibilities to all persons located throughout the State of Missouri, pursuant to Sections 185.040 and 185.050, RSMo. 1969, when it allocates 90% of available funds to individuals, organizations, associations and institutions located in the metropolitan areas of Missouri, specifically the City of St. Louis, St. Louis County and Jackson County, when only 55% of all persons located throughout the State of Missouri reside in the aforementioned metropolitan areas?"

We believe that Section 185.040, RSMo 1969, describes the duties of the State Council on the Arts with particularity wherein it says:

"The duties of the council shall be:

(1) To stimulate and encourage throughout the state the study and presentation

Honorable Harold F. Reisch

of the performing and fine arts and public interest and participation therein;

(2) To make such surveys as may be deemed advisable of public and private institutions engaged within the state in artistic and cultural activities, including, but not limited to, music, theater, dance, painting, sculpture, architecture, and allied arts and crafts, and to make recommendations concerning appropriate methods to encourage participation in and appreciation of the arts to meet the legitimate needs and aspirations of persons in all parts of the state;

(3) To take such steps as may be necessary and appropriate to encourage public interest in the cultural heritage of our state and to expand the state's cultural resources; and

(4) To encourage and assist freedom of artistic expression essential for the well-being of the arts."

The subsequent section, Section 185.050, RSMo 1969, describes the powers of the Council to hold public and private hearings; enter into contracts with available funds; accept gifts, contributions, and requests; and receive assistance from other departments and agencies of the state in connection with carrying out the duties of the Council.

Conspicuously, there is nothing in Chapter 185 which states that available funds are to be allocated by some formula or in a particular manner to various areas of the state. This is left within the sole discretion of the Council with the duty of the Council primarily to stimulate and encourage "throughout the state the study and presentation of the performing and fine arts." The obvious purpose is to leave the matter of how this is done to the sole discretion of the Council.

It is a primary rule of statutory construction that we should establish the legislative intent from the plain language of the statute. The clear and unambiguous language in Chapter 185 indicates that the State Council on the Arts has sole discretion to decide how its funds are allocated in carrying out its duties.

Thus, in direct response to your question, we cannot say that the Missouri State Council on the Arts is failing to comply

Honorable Harold F. Reisch

with its statutory duties, powers, and responsibilities wherein it allocates ninety percent of available funds to individuals, organizations, associations, and institutions located in the two largest metropolitan areas of this state. We further believe that any formula which may be imposed upon the State Council on the Arts should be established by legislative means.

Yours very truly,

A handwritten signature in dark ink, reading "John Ashcroft", with a long horizontal flourish extending to the right.

JOHN ASHCROFT
Attorney General

Attorney General of Missouri

JOHN ASHCROFT
ATTORNEY GENERAL

JEFFERSON CITY
65101

(314) 751-3321

April 20, 1978

OPINION LETTER NO. 52

Honorable Richard C. Hamilton
Representative, District 131
Room 405, State Capitol Building
Jefferson City, Missouri 65101

Dear Representative Hamilton:

This is in response to your request concerning the following questions:

"1. When awarding auctioneering contracts, is the state of Missouri limited to awarding such contracts only to auctioneers who are duly licensed under chapter 343, RSMo?

"2. Does the state purchasing agent have the right to disqualify someone who has bid on a state contract merely because the person making the bid does not comply with a regulation of the state purchasing agent, when such regulation has not been filed with the secretary of state as required by chapter 536, RSMo?"

Your request sets out the following facts:

"The state purchasing agent let bids for an auctioneering contract, and the lowest bid received was from a gentleman from Pulaski County. This gentleman's bid was disqualified because he did not have a license as required by chapter 343, RSMo, and because he did not have three years' experience as an auctioneer, which the state purchasing agent claims to require by regulation,

Honorable Richard C. Hamilton

although no such regulation has been filed with the secretary of state. The gentleman who was finally awarded this contract is not licensed under chapter 343, RSMo, either."

We have inquired further of the Division of Purchasing, Office of Administration, and are advised that the contract was not awarded to the lowest bid because that bidder did not have three years' experience as required by the bid specification. The fact that the lowest bid was received from a person who did not have an auctioneering license was given no consideration. The person granted the bid met the three year requirement.

It is apparent that the bid was not accepted because the bidder did not meet the specifications as set out by the Division of Purchasing. His failure to have a license had nothing to do with rejecting the bid.

Our view is that bid specifications do not constitute rules within the definition of rules under Section 536.010, RSMo Supp. 1976.

Under all the facts and the appropriate law, it is our further view that the purchasing agent had the authority to disqualify the bidder for failing to meet the specifications.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John Ashcroft", with a stylized, flowing script.

JOHN ASHCROFT
Attorney General

COUNTIES:
COUNTY COURTHOUSE:
RECORDER OF DEEDS:

Although an abstract business
cannot generally lease space
in a county courthouse for
abstract business such business

has the right to inspect and copy records in the office of the
recorder of deeds or in a space close thereto under the supervision
of the recorder of deeds and upon payment of charges fixed by the
county court for the use of space and supervisory personnel upon
the same terms afforded the public generally. There is no authority
for an abstract company or any private individual to use county
equipment for such copying.

OPINION NO. 55

August 4, 1978

Honorable John E. Casey
Prosecuting Attorney
Linn County
116 North Main
Brookfield, Missouri 64628



Dear Mr. Casey:

This opinion is in response to your question asking concerning the provisions of Section 59.310, RSMo, as amended by Senate Bill No. 112, 79th General Assembly, First Regular Session. You point out that subsection 3 of amended Section 59.310 provides that the county recorders of deeds shall be allowed one dollar (\$1.00) for each page for copying or reproducing any recorded instrument.

Your question is as follows:

"The question is, does this Statute prohibit a County Recorder and/or County Court from entering into an agreement with an Abstract Company whereby the Abstract Company can use the copying machine in the Recorder's Office, which is leased by the County for the purpose of copying duly recorded instruments at a charge of less than \$1.00 per page? All proceeds would be paid to the County."

With respect to that part of your question which pertains to the use of county equipment or courthouse property by a private firm, we note that we have issued several opinions which are

Honorable John E. Casey

relevant to your question. That is, in our Opinion No. 150, dated April 28, 1971 to Gilchrist, this office concluded that a farmers mutual insurance company is a private commercial enterprise and may not be permitted to occupy office space in the county courthouse for the conduct of its business. In our Opinion No. 15, dated February 23, 1955 to Carr, this office concluded that a county court may not lawfully permit the usage of public property in the form of office space in a county courthouse for the conduct of a private commercial enterprise. In our Opinion No. 42, dated December 20, 1954, to Hosmer, this office concluded that a county court did not have the authority to rent space in the courthouse to private persons for private use. In our Opinion No. 20, dated February 13, 1951 to Curry, this office concluded that the county courts do not have authority to lease or permit the use of space in the county courthouse for private purposes. In our Opinion No. 63, dated February 16, 1954 to Moody, this office concluded that a township has no authority to use township machinery to do work for private individuals for hire. In our Opinion No. 5, dated January 12, 1970, this office concluded that there were exceptions to the prohibition against the county leasing public property in general so that leases may be permissible in space other than courthouse space where the lease of the county property to private individuals was not an interference with the public use of the county property by the county, the county had no immediate need for the facilities for county purposes and the lease was to the financial betterment of the county. In our Opinion No. 4, dated December 9, 1966 to Evans, this office concluded that publicly owned equipment could not be used to render nonpublic service. We are enclosing copies of the above opinions.

We point out, however, that Section 109.190, RSMo, relative to the inspection of public records, is pertinent to your question. Such section provides:

"In all cases where the public or any person interested has a right to inspect or take extracts or make copies from any public records, instruments or documents, any person has the right of access to the records, documents or instruments for the purpose of making photographs of them while in the possession, custody and control of the lawful custodian thereof or his authorized deputy. The work shall be done under the supervision of the lawful custodian of the records who may adopt and enforce reasonable rules governing the work. The

Honorable John E. Casey

work shall, where possible, be done in the room where the records, documents or instruments are by law kept, but if that is impossible or impracticable, the work shall be done in another room or place as nearly adjacent to the place of custody as possible to be determined by the custodian of the records. While the work authorized herein is in progress, the lawful custodian of the records may charge the person desiring to make the photographs a reasonable rate for his services or for the services of a deputy to supervise the work and for the use of the room or place where the work is done."

It has been stated that at common law, the right of inspection of public records was limited to those having some interest in such records and some cases have applied this common law rule in denying an abstractor or insurer of title the right to inspect and copy public records. 1 Am.Jur.2d Abstracts of Title § 8. However, it now appears to be the generally recognized rule that such businesses do have a right of inspection under public records laws. State ex rel. Eggers v. Brown, 134 S.W.2d 28 (Mo.Banc 1939). Although the case authority on the subject consists of numerous conflicting opinions, the present trend appears to acknowledge a right in such companies not only to copy such records but also to have available to them such facilities as are authorized to be made available by statute for the purpose of copying. Annot., 80 A.L.R. 760, et seq.

Since the right of inspection is dependent on the statutory provisions, we must look to the provisions of Section 109.190. That section provides for right of access for the purpose of copying while such records are in the possession of the custodian, copying under the supervision of the custodian who may adopt reasonable regulations governing the work, copying where the records are located or close thereto if necessary, and the imposition of charges by the custodian for services in supervising the work and for the use of the room where the work is done.

Notably, there is no authorization for the person doing the copying to use county equipment, such as copying equipment or other mechanical equipment or paper, pen and the like. The authorization for the use of a room implies the use of suitable lighting equipment, chairs and desks but cannot be said to extend to other equipment whose use is not expressly authorized by said section or included by necessary implication within that expressly authorized. Since the county court has control over county

Honorable John E. Casey

buildings by virtue of its powers expressed in Section 49.270, RSMo, it would be within the jurisdiction of the county court to determine what charges should be made for the use of space authorized by Section 109.190 although the approval of the recorder of deeds would be required authorizing the use of space assigned to his office. Likewise, we believe that the county court, as the constitutional governing body of the county under Section 7 of Article VI of the Missouri Constitution, is the proper body to determine the rates to be charged for deputies' services in supervising such copying. We reach this conclusion despite the provisions of Section 109.190, which refer to the custodian of the records, because of the specific provisions concerning the duties and powers of the county court.

We also point out that the charges made must adequately cover the costs of the county personnel and space. Likewise, the authorization made to such abstract companies to copy under such section can be no greater than that afforded the public, and, accordingly, the same rights must be afforded the public generally. It should also be clear that copying work by the abstract companies must not be such as to interfere with the duties of the recorder of deeds, the use made by the public of the facilities, or the general use of courthouse facilities by the public. State v. Brown, supra.

Finally, as to your initial question concerning the statutory fee of the recorder for copying, it is our view that such fee does not apply and is not to be collected where the copying is done by a member of the public under Section 109.190. While, under the authorities previously cited, there is some authority that the statutory fee must be charged, the prevailing weight of modern authority indicates that such statutory fees only apply to copying by the officer or his deputies and do not apply to copying by the public under public records laws.

Where the recorder or his deputy copies such documents the statutory fee must be charged. See Section 59.200, RSMo and Section 59.310, as amended.

CONCLUSION

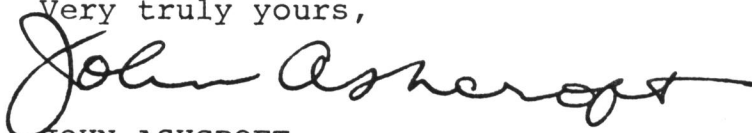
It is the opinion of this office that although an abstract business cannot generally lease space in a county courthouse for abstract business such business has the right to inspect and copy records in the office of the recorder of deeds or in a space close thereto under the supervision of the recorder of deeds and upon payment of charges fixed by the county court for the use of

Honorable John E. Casey

space and supervisory personnel upon the same terms afforded the public generally. There is no authority for an abstract company or any private individual to use county equipment for such copying.

The foregoing opinion, which I hereby approve, was prepared by my assistant, John C. Klaffenbach.

Very truly yours,



JOHN ASHCROFT
Attorney General

Enclosures: Op. No. 150,
4/28/71, Gilchrist

Op. No. 15,
2/23/55, Carr

Op. No. 42,
12/20/54, Hosmer w/D

Op. No. 20,
2/13/51, Curry

Op. No. 63,
2/16/54, Moody

Op. No. 4,
12/9/66, Evans

Op. No. 5,
1/12/70, Wessel

Attorney General of Missouri

JOHN ASHCROFT
ATTORNEY GENERAL

JEFFERSON CITY
65101

(314) 751-3321

April 21, 1978

OPINION LETTER NO. 57

Honorable George E. Murray
State Senator, 26th District
Room 433, Capitol Building
Jefferson City, Missouri 65101

Dear Senator Murray:

This letter is in answer to your request for an opinion of this office which reads as follows:

"May a legally licensed Missouri pharmacy which is part of a chain, at the customer's request, obtain the transfer of a prescription from another pharmacy in the same chain and legally dispense a refill on the computer transferred prescription if the prescription may otherwise be legally refilled?"

A search of the Missouri statutes revealed no specific provision which would prevent members of a chain of pharmacies from refilling prescriptions originally filled at one pharmacy, based upon a copy of that original prescription transferred by a central computer to another pharmacy in the chain.

However, this office directs your attention to Title 21 U.S.C.A. § 353(b)(1), which reads as follows:

"A drug intended for use by man which--

(A) is a habit-forming drug to which section 352(d) of this title applies; or

Honorable George E. Murray

(B) because of its toxicity or other potentiality for harmful effect, or the method of its use, or the collateral measures necessary to its use, is not safe for use except under the supervision of a practitioner licensed by law to administer such drug; or

(C) is limited by an approved application under section 355 of this title to use under the professional supervision of a practitioner licensed by law to administer such drug,

shall be dispensed only (i) upon a written prescription of a practitioner licensed by law to administer such drug, or (ii) upon an oral prescription of such practitioner which is reduced promptly to writing and filed by the pharmacist, or (iii) by refilling any such written or oral prescription if such refilling is authorized by the prescriber either in the original prescription or by oral order which is reduced promptly to writing and filed by the pharmacist. The act of dispensing a drug contrary to the provisions of this paragraph shall be deemed to be an act which results in the drug being misbranded while held for sale."

Title 21 U.S.C.A. § 331, reads in part as follows:

"The following acts and the causing thereof are prohibited:

* * *

(k) The alteration, mutilation, destruction, obliteration, or removal of the whole or any part of the labeling of, or the doing of any other act with respect to, a food, drug, device, or cosmetic, if such act is done while such article is held for sale (whether or not the first sale) after shipment in interstate commerce and results in such article being adulterated or misbranded."

Honorable George E. Murray

Title 21 U.S.C.A. § 333, reads in part as follows:

"(a) Any person who violates a provision of section 331 of this title shall be imprisoned for not more than one year or fined not more than \$1,000, or both.

"(b) Notwithstanding the provisions of subsection (a) of this section, if any person commits such a violation after a conviction of him under this section has become final, or commits such a violation with the intent to defraud or mislead, such person shall be imprisoned for not more than three years or fined not more than \$10,000, or both."

The Rx Legend, An FDA Manual for Pharmacists, FDA Publication No. 12 (Revised May 1972), page 16, reads as follows:

"Q. Can I give a copy of a prescription?
Can I fill or refill a copy of a prescription?

"A. You can give a copy of a prescription. It should be clearly marked as a copy, and it has no legal status as a valid prescription that can be filled or refilled by a pharmacist. We recognize that a copy of a prescription may be useful for information purposes. We think that is the only purpose a copy of a prescription can serve.

"The difficulty faced by a pharmacist who wishes to refill a prescription on the basis of a copy is that no matter what kind of refill instructions are marked on the copy, the pharmacist who receives it has no way of knowing whether or to what extent that prescription has been refilled by the pharmacy where it was originally filled. Indeed he cannot ascertain whether copies have been given to other pharmacies. His only entirely safe course is to call the prescribing physician; and then, in practical effect, he is getting a new prescription."

Honorable George E. Murray

Thus, it is possible that the refilling of the copy of the prescription provided by the computer may be construed by the federal authorities as dispensing drugs without a prescription, and thus a violation of 21 U.S.C.A. § 331. Should the pharmacist and/or pharmacy involved be convicted of a felony in Federal court pursuant to 21 U.S.C.A. § 333, the state permit of that pharmacist and/or pharmacy would be subject to disciplinary action pursuant to Sections 331.055 and 338.285, RSMo Supp. 1975. Section 338.055, reads in part as follows:

"2. The board may on its own information or on complaint of any person, cause a complaint to be filed before the administrative hearing commission pursuant to chapter 161, RSMo, charging a licensee with any of the specific acts of unprofessional or dishonorable conduct as set forth in this section, which conduct if proved shall constitute grounds for revocation or suspension of his license, or the placing of the licensee on probation. After the filing of such complaint by the board the proceeding will be conducted in accordance with the provisions of chapter 161, RSMo.

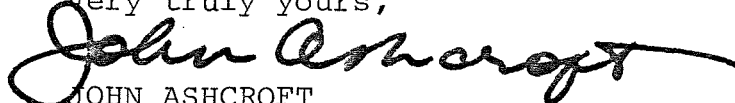
"3. The following specifications shall be deemed unprofessional or dishonorable conduct within the meaning of this section:

(1) Conviction of a felony;"

A pharmacist and/or pharmacy may also lose the Missouri Controlled Substance Registration if convicted of a felony or any law related to controlled substances, or if the federal registration to manufacture, distribute or dispense is suspended or revoked. See Section 195.040, RSMo Supp. 1975.

It is our view that there is no Missouri statute which prohibits a legally licensed Missouri pharmacy which is a part of a chain of pharmacies from obtaining the transfer of such a prescription from another pharmacy in the same chain and dispensing a refill based on the computer transferred copy of the prescription if the prescription may otherwise be legally refilled. However federal authorities should be consulted to determine if this activity would constitute a violation of the federal laws or regulations.

Very truly yours,



JOHN ASHCROFT
Attorney General



JOHN ASHCROFT
ATTORNEY GENERAL

Attorney General of Missouri

JEFFERSON CITY

65101

(314) 751-3321

July 11, 1978

OPINION LETTER NO. 59

Honorable Harry Hill
State Representative, District 2
Route 1
Novinger, Missouri 63559

Dear Representative Hill:

This is in response to your request for an opinion on the following question:

"Pursuant to subsection 9 of Section 163.031 (8) RSMo 1976 Supp. may a school district, which during the year transfers funds from the teachers' fund to the incidental fund but rebalances each fund in their proper 80% - 20% by the end of the fiscal year, require that the teachers' fund pay the interest on any monies that the teachers' fund must borrow to meet its obligations while being temporarily deficient due to the transfer to the incidental fund?"

After telephone conversations with you, we understand the facts to be as follows: The school district upon receiving its September state allotment placed only 31% rather than 80% to the credit of the teachers' fund. The rest was placed in the incidental fund. As a result, the teachers' fund was put in a position of having to borrow money and pay interest on that loan. If the teachers' fund had received 80% of the September payment it would have had to borrow less money, or perhaps no money at all. The incidental fund, which would have had to borrow had it received only 20% of the September payment, was spared this necessity (and the additional expense of paying interest on a

Honorable Harry Hill

loan) by receiving 69% of that payment. You have informed us that the school district's reason for crediting only 31% of the September payment to the teachers' fund is that the school board did not want to show a negative balance for two funds and took the view that the law relating to school funds is complied with if by the end of the fiscal year 80% of the total state moneys received in that year are placed in the teachers' fund.

Section 165.011, V.A.M.S., provides in relevant part:

"1. The following funds are created for the accounting of all school moneys: Teachers' fund, incidental fund, free textbook fund, building fund, and debt service fund. The treasurer of the school district shall open an account for each fund specified in this section, and all moneys received from the county school fund, all moneys derived from taxation for teachers' wages, all tuition fees, and not less than eighty percent of the state moneys received under sections 162.975 and 163.031, RSMo, and all other moneys received from the state except as herein provided, shall be placed to the credit of the teachers' fund. . . ."

Section 163.061, RSMo, states:

"Not less than eighty percent of the state school moneys received under the provisions of subsections 1, 2 and 3 of section 163.031 shall be placed in the teachers' fund and the remaining percent of such moneys in the incidental fund."

The question thus becomes whether 80% of each payment received from the state must be placed immediately in the teachers' fund or whether it is sufficient if by the end of the fiscal year 80% of all such payments are credited to the teachers' fund.

A school board, as a creature of statute, can exercise only such authority as is expressly conferred or arises by necessary implication from powers that are expressly conferred. Wright v. Board of Education of St. Louis, 246 S.W. 43 (Mo. 1922); Cape Girardeau School District No. 63 v. Frye, 225 S.W.2d 484 (St.L.Ct.App. 1949). There is no express statutory authority to defer crediting the teachers' fund with its statutory percentage

Honorable Harry Hill

of state moneys until the end of the fiscal year. We believe the intent of the statutes quoted above is that when money earmarked for the teachers' fund is received (whether that is tuition fees, money from the county school fund, or the 80% of state money received under Sections 162.975 and 163.031, V.A.M.S.) it must be credited to that fund.

Additional support for this position is found in Section 165.021.1, V.A.M.S., which provides:

"All moneys received by a school district shall be disbursed only for the purposes for which they were levied, collected or received."

Eighty percent of these state moneys are received by the school district for the purpose of paying teachers' salaries. If this money is credited to another fund and disbursed to meet that fund's expenses, it is obviously not being disbursed for the purpose for which it was received.

It is our view that a school board is not authorized to place less than 80% of any state moneys received under Sections 162.975 and 163.031, V.A.M.S., to the credit of the teachers' fund.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John Ashcroft", written in a cursive style.

JOHN ASHCROFT
Attorney General

Attorney General of Missouri

JOHN ASHCROFT
ATTORNEY GENERAL

JEFFERSON CITY

65101

(314) 751-3321

March 17, 1978

OPINION LETTER NO. 62

Dr. James Frank
President
Lincoln University
Jefferson City, Missouri 65101

Dear Dr. Frank:

This letter is in response to your request for an opinion.
The question reads as follows:

"Does Section 15.10 of the Omnibus State
Reorganization Act of 1974 apply to real
property owned or acquired by Lincoln
University?"

Section 175.040, RSMo 1969, provides that:

"It is hereby provided that the board of
curators of the Lincoln university shall
organize after the manner of the board
of curators of the state university of
Missouri; and it is further provided, that
the powers, authority, responsibilities,
privileges, immunities, liabilities and
compensation of the board of curators of
the Lincoln university shall be the same
as those prescribed by statute for the
board of curators of the state university
of Missouri, except as stated in this
chapter."

Dr. James Frank

Section 172.020, as amended, S.B. No. 47, 1977, gives the Board of Curators of the University of Missouri the power

" . . . to take, purchase and to sell, convey and otherwise dispose of lands and chattels, except that the curators shall not have the power to subdivide, sell or convey title to any land contained within a university campus or to subdivide, sell or convey title to any portion of any parcel of land containing in excess of twenty-five hundred contiguous acres unless such transaction is approved by the general assembly by passage of a concurrent resolution signed by the governor. . . ."

Your question deals with the effect of Section 15.10 of the Omnibus State Reorganization Act of 1974 on the power of the Board of Curators of Lincoln University to hold and convey fee title to real property. That section reads as follows:

"The fee title to all real property now owned or hereafter acquired by the state of Missouri, or any department, division, commission, board or agency of state government, other than real property owned or possessed by the state highway commission, conservation commission, state park board, and the university of Missouri, shall on the effective date of this act vest in the governor. The governor may not convey or otherwise transfer the title to or other interest in such real property, unless such conveyance or transfer is first authorized by an act of the general assembly. The commissioner of administration shall prepare management plans for such properties in the manner set out in subparagraph 7 above."

The General Assembly of the State of Missouri, in enacting Section 175.040, RSMo 1969, gave the Board of Curators of Lincoln University powers identical to those of the Board of Curators of the University of Missouri, "except as stated in this chapter." In enacting that section, the legislature specifically limited

Dr. James Frank

the manner in which the powers of the Board of Curators of Lincoln University could be made dissimilar to those of the Board of Curators of the University of Missouri.

The statutory language which gives Lincoln University's Board of Curators powers concurrent with those of the University of Missouri's Board of Curators specifically provides that exceptions shall be limited to those set forth in Chapter 175, RSMo 1969. The presumption is that the legislature in enacting a statute, acts with full knowledge of existing statutes on the same subject. City of Nevada v. Bastow, 328 S.W.2d 45, 49 (K.C.Mo.App. 1959). In the absence of an amendment to Chapter 175, RSMo 1969, it must be concluded that the General Assembly intended that the powers of the Curators of Lincoln University remain identical to those of the Curators of the University of Missouri.

Therefore, it is the view of this office that Section 15.10 of the Omnibus State Reorganization Act of 1974 does not deprive the Board of Curators of Lincoln University of its statutory authority to hold and convey title to real property.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John Ashcroft", with a long horizontal flourish extending to the right.

JOHN ASHCROFT
Attorney General

Attorney General of Missouri

JOHN ASHCROFT
ATTORNEY GENERAL

JEFFERSON CITY

65101

(314) 751-3321

October 24, 1978

OPINION LETTER NO. 67

Honorable Al Nilges
State Representative, District 126
Room 413, Capitol Building
Jefferson City, Missouri 65101

Dear Representative Nilges:

This letter is in response to your question asking:

"What are the legal responsibilities for fire protection a Fire District has with regards to Corps of Engineers property. Must fire protection without compensation from the federal government be provided or can the Fire District require them to provide compensation at the same rate as the other taxpayers in the district?"

It is clear that Section 43 of Article III of the Missouri Constitution excepts lands which are the property of the United States from taxation.

A fire district is obviously not an insurer of the property within its district. However, we believe that such a district must respond to calls for protection from agencies of the federal government relating to United States property within its district and must furnish fire protection services such as are within the fire district's practical capabilities.

We note however, that fire protection districts have authority under Section 321.220, V.A.M.S., to enter into contracts with the United States of America and its agencies for common services re-

Honorable Al Nilges

lating to the control or prevention of fires, including the installation, operation and maintenance of water supply distribution, fire hydrant and fire alarm systems. Similarly, we note that Sections 42 USCA §1856, et seq., provide that heads of federal agencies charged with the duty of providing fire protection for any property of the United States are authorized to enter into reciprocal agreements with any fire organization maintaining fire protection facilities in the vicinity of such property.

Therefore, it is our view that since the fire protection district has authority to enter into an agreement for common services with the United States government and since the agency of the United States Government having the duty to protect the property has authority to enter into an agreement with the fire protection district, it seems appropriate that the possibility of entering into such an agreement should be explored. We assume that the "agency head" of the United States government department involved will give appropriate consideration to exploring the possibility of such an agreement pursuant to the congressional intent indicated by the enactment of the provisions contained in 42 USCA §1856, et seq.

For your information we enclose a copy of pages 1948, et seq., of the 1955 U.S. Code Congressional and Administrative News relative to the legislative history and purpose of the federal law.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John Ashcroft", with a long, sweeping horizontal line extending to the right.

JOHN ASHCROFT
Attorney General

Enclosure



JOHN ASHCROFT
ATTORNEY GENERAL

Attorney General of Missouri

JEFFERSON CITY

65101

(314) 751-3321

June 22, 1978

OPINION LETTER NO. 68

Honorable Richard J. DeCoster
State Representative, District 1
College Street
Canton, Missouri 63435

Dear Representative DeCoster:

This is in response to your request for an official opinion with regard to the following questions:

"Do state agencies that oversee federal programs that are guided by federal regulations have to publish rules in the Missouri Register and the Missouri Code of State Regulations if they wish to impose additional guidelines to those programs?

"If state agencies have issued 'policy memorandums' that require certain actions by non-state agencies, what is their effect if they have not been published in the Missouri Register or the Missouri Code of State Regulations?"

Requirements for the issuance of rules and regulations by state agencies are found in Chapter 536, RSMo Supp. 1976. In determining whether this statute applies to the questions presented, it must first be determined if in fact the questioned "guidelines", "policy memorandums" or like utterances of a given state agency constitute "rules" within the meaning of Chapter 536.

Section 536.010(4), RSMo Supp. 1976, defines "rule" as follows:

"(4) 'Rule' means each agency statement of general applicability that implements, interprets, or prescribes law or policy, or that describes the organization, procedure, or practice requirements of any agency. The term includes the amendment or repeal of an existing rule, but does not include:

(a) A statement concerning only the internal management of an agency and which does not substantially affect the legal rights of, or procedures available to, the public or any segment thereof;

(b) A declaratory ruling issued pursuant to section 536.050, or an interpretation issued by an agency with respect to a specific set of facts and intended to apply only to that specific set of facts;

(c) An intergovernmental, interagency, or intraagency memorandum, directive, manual or other communication which does not substantially affect the legal rights of, or procedures available to, the public or any segment thereof;

(d) A determination, decision, or order in a contested case;

(e) An opinion of the attorney general;

(f) Those portions of staff manuals, instructions or other statements issued by an agency which set forth criteria or guidelines to be used by its staff in auditing, in making inspections, in settling commercial disputes or negotiating commercial arrangements, or in the selection or handling of cases, such as operational tactics or allowable tolerances or criteria for the defense, prosecution, or settlement of cases, when the disclosure or such statements would enable law violators to avoid detection, facilitate disregard of requirements imposed by law, or give a clearly improper advantage to persons who are in an adverse position to the state;

Honorable Richard J. DeCoster

(g) A specification of the prices to be charged for goods or services sold by an agency as distinguished from a license fee, or other fees;

(h) A statement concerning only the physical servicing, maintenance or care of publicly owned or operated facilities or property;

(i) A statement relating to the use of a particular publicly owned or operated facility or property, the substance of which is indicated to the public by means of signs or signals;

(j) A decision by an agency not to exercise a discretionary power;

(k) A statement concerning only inmates of an institution under the control of the division of corrections or the division of youth services, students enrolled in an educational institution, or clients of a health care facility, when issued by such an agency;

(l) Statements or requirements establishing the conditions under which persons may participate in exhibitions, fairs or similar activities, managed by the state or an agency of the state;

(m) Income tax or sales tax forms, returns and instruction booklets prepared by the state department of revenue for distribution to taxpayers for use in preparing tax returns."

Assuming that the utterance of the agency is a rule within the meaning of Section 536.010(4), do such rules have to be published in the Missouri Register and the Missouri Code of State Regulations? If the utterance is a "rule" and is to have the force and effect of such, then it must be published in accordance with Sections 536.021 and 536.031, RSMo Supp. 1976.

Section 536.021.1, RSMo Supp. 1976, states:

"No rule shall hereafter be made, amended or rescinded by any state agency unless such agency shall first file with the secretary of state

Honorable Richard J. DeCoster

a notice of proposed rulemaking and a subsequent order of rulemaking, both of which shall be published in the Missouri register by the secretary of state as soon as practicable after the filing thereof in his office; except that a notice of proposed rulemaking is not required for the establishment of hunting or fishing seasons and limits or for the establishment of state program plans required under federal education acts or regulations.

The remainder of the section describes the details of publication in the Missouri Register.

Section 536.031.2, RSMo Supp. 1976, states:

"The code of state regulations shall contain the full text of all rules of state agencies in force and effect upon the effective date of the first publication thereof, and it shall be revised at least every six months thereafter so as to include all rules of state agencies subsequently made, amended or rescinded. . . ."

Taking these two sections together, it is clear that any utterance of a state agency, except for the statutory exceptions, which purports to be an enforceable rule within the statutory meaning must be published in the Missouri Register and Missouri Code of State Regulations.

In determining the effect of such rules if an agency fails to comply with the requirements set out above, one must refer to Section 536.021.6, RSMo Supp. 1976, which states:

"Except as provided in sections 536.023.4 and 536.025 any rule, or amendment or rescission thereof, made after January 1, 1976, shall be void unless made in accordance with the provisions of this section."

From this, it is clear that failure to comply with the publication requirements of Section 536.021 renders the rule void and of no effect insofar as rules promulgated after January 1, 1976, are concerned.

Rules promulgated prior to January 1, 1976, are governed by Section 536.023.4, RSMo Supp. 1976, which states:

Honorable Richard J. DeCoster

"All rules on file with the secretary of state upon January 1, 1976, which do not conform to said uniform procedures, shall be rewritten so as to conform thereto and shall be refiled with the secretary of state not later than ninety days after January 1, 1976, and no rule shall be promulgated, amended or rescinded during said ninety-day period except pursuant to section 536.025. The original rules shall remain in effect until rewritten and refiled, and the rewritten rules shall become effective immediately upon refiled without following the provisions of section 536.021; provided, however, that any rule which is not so rewritten and refiled within ninety days after January 1, 1976, shall then lapse and be of no further force and effect unless and until it shall be promulgated in accordance with the provisions of section 536.021."

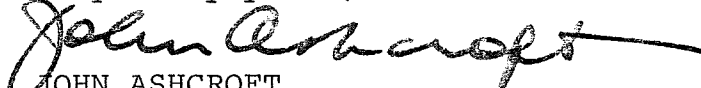
Since the ninety-day grace period following January 1, 1976, has long since expired, it follows that any rules now in effect would have to have complied with the provisions of Chapter 536 set forth in this opinion.

One caveat needs to be kept in mind, however. There is always the chance that some provision in the specific federal law being administered at the state level may be in conflict with the statutes governing the promulgation of rules and regulations in the state of Missouri. This raises several questions which are beyond the scope of this opinion.

Therefore, it is our view that state agencies that oversee federal programs which are guided by federal regulations have to publish rules in the Missouri Register and the Missouri Code of State Regulations if they wish to impose additional guidelines to those programs and the proposed rules fall within the definition of "rule" found in the Missouri Administrative Procedure Act, Section 536.010.4.

It is our further view that if "policy memorandums" issued by state agencies that require certain actions by nonstate agencies constitute "rules" as defined by Section 536.010.4, RSMo Supp. 1976, then such "policy memorandums" have no force and effect as agency rules and regulations unless the publication requirements of Chapter 536, RSMo Supp. 1976 are complied with.

Very truly yours,


JOHN ASHCROFT
Attorney General

Attorney General of Missouri

JOHN ASHCROFT
ATTORNEY GENERAL

JEFFERSON CITY
65101

(314) 751-3321

February 28, 1978

OPINION LETTER NO. 70

Mr. Patrick Cronan
Prosecuting Attorney
Howard County Courthouse
Fayette, Missouri 65248

Dear Mr. Cronan:

This letter is in answer to your question asking whether Howard County has authority to waive sovereign immunity and whether Howard County has authority to pay a claim resulting from an automobile accident with county road graders.

Although the Missouri Supreme Court has abolished sovereign immunity effective August 15, 1978, Jones v. State Highway Commission, No. 60017, September 12, 1977, such ruling may be affected by pending legislation, and, in any event, would not be applicable to the case you present.

We are enclosing the opinions of this office, listed below, which are self-explanatory and which answer your questions. Therefore, consistent with the views expressed in the enclosed opinions, it is our conclusion that Howard County does not have the authority to waive sovereign immunity and that Howard County does not have authority to pay such claims made against the county or against county employees.

Very truly yours,



JOHN ASHCROFT
Attorney General

Mr. Patrick Cronan

Enclosures: Op. No. 98
6-18-51, Witte

Op. No. 39
4-24-56, Henson

Op. No. 99
5-12-60, Woods

Op. Ltr. No. 153
3-30-65, Keane

Op. Ltr. No. 355
11-9-65, Walsh

Attorney General of Missouri

JOHN ASHCROFT
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May 26, 1978

OPINION LETTER NO. 71

Honorable John Buechner
State Representative, District 94
14 Ponca Trail
Kirkwood, Missouri 63122

Dear Representative Buechner:

This is to acknowledge receipt of your request for an opinion from this office which reads as follows:

"After the decision and the modification, subsequently rendered, by the Supreme Court of Mo. in Labor's Educational and Political Club - vs Danforth, is it lawful, under § 129.070 or any other applicable statutes, for any corporation organized and doing business under and by virtue of the laws of Missouri to organize and support the political action committees using the definition of political action committee that was set forth in proposition one."

In considering your opinion request, there are certain basic assumptions that will be made. In accordance with Attorney General Opinion Letter No. 73, Proffer, May 3, 1978, the assumption is made that § 129.070, RSMo 1969 is presently the law in effect in the State of Missouri. Your opinion request will be considered from the viewpoint as to whether or not § 129.070, RSMo 1969 prohibits corporations organized and doing business under and by virtue of the laws of Missouri from organizing and supporting political action committees (hereinafter referred to as PACs).

It should be noted that this opinion does not intend in any way to interpret the provisions of federal law.

Honorable John Buechner

BASIC POLITICAL ACTION COMMITTEE STRUCTURE

This opinion letter relates to PACs that are voluntary, nonprofit, unincorporated associations, formed under the auspices of companies which are independent of any political party, candidate or organization. The stated purposes of such committees are to promote the effective citizenship of salaried personnel who have policy-making, managerial, professional or supervisory responsibilities. This is to be done by facilitating their financial participation in the elective processes and to assist in the nomination and election of candidates for state offices who will support integrity in government and advance the interest of the free enterprise system.

Membership and participation in such PACs is open to all U.S. citizens who are salaried personnel of the company (with an annual salary in excess of a certain amount) who have policy-making, managerial, professional or supervisory responsibilities.

Contributions to PACs are entirely voluntary and no contributions may be solicited by physical force, job discrimination or financial reprisal (or threat thereof) or as a condition of employment or through a promise of reimbursement by the company. The solicitor must inform the person being solicited of the above facts and rights and of the fact that any contribution guidelines are but suggestions only and that no rewards or sanctions of any nature whatsoever will result from the contribution of more or less than the suggested amount, or no amount at all. Although contributions may be solicited during working hours and on company premises, no contributions may be solicited by a corporate superior of the person being solicited.

For the convenience of the employee, contributions in the amount desired by the employee may be made by deductions from the employee's paycheck by the company on a regular basis for remittance to the PACs. No amount contributed by the employee under this plan may be repaid to the employee by the company. The authorization to deduct contributions from the employee's salary is revocable by the employee at any time.

Contributions to the PACs are deposited in a bank account in the name of the PACs. This account is separate in all respects from any account of the company, and the company may not in any way control or use the funds in this account.

Companies often advance to the PACs funds necessary for their establishment and operation and for the solicitation and

Honorable John Buechner

collection of contributions to them. However, PACs must reimburse companies from their separate accounts for all amounts advanced to them and all expenses incurred by the companies (including the reasonable rental value of any company facilities which may be used by the PACs), and for salaries and wages paid to employees while engaged in soliciting contributions during working hours, unless such time is "made up" by the employee by working additional hours without further compensation.

The chairman, treasurer and secretary of such PACs, who must be PAC members are elected once each year by majority vote of PAC members and may be removed in like manner at any time.

The executive committee of such PACs consists of the chairman, treasurer and secretary and such other PAC members as may be elected by the members from time to time. The executive committee alone is empowered to set the basic policies with respect to expenditures to be made by the PAC, and to direct disbursements to specific candidates and committees. Companies have no power to set policy or to direct expenditures by PACs or direct any contributions to any candidates or committees.

In the event of the dissolution of such PACs, all property and assets belonging to the PACs (in excess of its debts and expenses on distribution) are to be promptly returned to the contributing individuals on a pro rata basis, determined by the relative contributions of each, or if this proves unfeasible, are to be promptly distributed for the purposes stated in the PAC articles of association.

THE APPLICABLE MISSOURI STATUTE

In connection with the above, Section 129.070, RSMo 1969, reads in part as follows:

"It shall not be lawful for any corporation organized and doing business under and by virtue of the laws of this state to, directly or indirectly, by or through any of its officers or agents, or by or through any person or persons for them, influence or attempt to influence the result of any election to be held in this state or procure or endeavor to procure the election of any person to a public office by the use of money belonging to such corporation, or by subscribing any money to any campaign fund of any party or person, or by discharging or threatening to discharge any employee

Honorable John Buechner

of such corporation for reason of the political opinions of such employee, or to use or offer to use any power, effort, influence or other means whatsoever, to induce or persuade any employee or other person entitled to register before or vote at any election, to vote or refrain from voting for any candidate or on any question to be determined or at issue in any election. . . ."

ANALYSIS

Under the above statute, the methods of influencing elections prohibited by the statute are as follows:

- (1) The "use of money" belonging to the corporation;
- (2) Subscribing corporate money to the campaign fund of any person or persons;
- (3) Discharging or threatening to discharge any employee for reason of his or her political opinions; and
- (4) To use or offer to use any power, effort, influence or other means whatsoever to induce or persuade any employee to vote or refrain from voting for any candidate or on any question to be determined or at issue in the election.

In this regard, there is authority for the proposition that the Missouri Corrupt Practices Act, of which § 129.070, RSMo, supra, is a part, is penal in nature and should be strictly construed. See State ex rel. Wright v. Carter, 319 S.W.2d 596, 598 (Mo.Banc 1959). In this decision, the Supreme Court of Missouri stated at page 598:

" . . . When we say a statute should be strictly construed we generally mean that it can be given no broader application than is warranted by its plain and unambiguous terms. . . ."

Therefore, under the plain and unambiguous terms of § 129.070, RSMo 1969, the issue for consideration is whether or not the establishment and operation of the PACs as herein described is prohibited by the statute.

Honorable John Buechner

It should be noted that there have been no appellate court decisions in this state that have considered the above issue. However, a similar provision of federal law has been interpreted by the United States Supreme Court in the case of Pipefitters' Local Union No. 562, et al. v. United States, 407 U.S. 385, 92 S.Ct. 2247, 33 L.Ed.2d 11 (1972).

In the Pipefitters case, the United States Supreme Court suggested the appropriate attributes of a legitimate political fund and stated at 407 U.S. 414 as follows:

"We think that neither side fully and accurately portrays the attributes of legitimate political funds. We hold that such a fund must be separate from the sponsoring union only in the sense that there must be a strict segregation of its monies from union dues and assessments. We hold, too, that, although solicitation by union officials is permissible, such solicitation must be conducted under circumstances plainly indicating that donations are for a political purpose and that those solicited may decline to contribute without loss of job, union membership, or any other reprisal within the union's institutional power. Thus, we agree with the second half of the Government's position, but reject the first.

"As Senator Taft's remarks quoted above indicate, supra, at 406-408, the test of voluntariness under § 610 focuses on whether the contributions solicited for political use are knowing free-choice donations. The dominant concern in requiring that contributions be voluntary was, after all, to protect the dissenting stockholder or union member. Whether the solicitation scheme is designed to inform the individual solicited of the political nature of the fund and his freedom to refuse support is, therefore, determinative.

"Nowhere, however, has Congress required that the political organization be formally or functionally independent of union control or that union officials be barred from soliciting

Honorable John Buechner

contributions or even precluded from determining how the monies raised will be spent. The Government's argument to the contrary in the first half of its position is based on a misunderstanding of the purposes of § 610. When Congress prohibited labor organizations from making contributions or expenditures in connection with federal elections, it was, of course, concerned not only to protect minority interests within the union but to eliminate the effect of aggregated wealth on federal elections. But the aggregated wealth it plainly had in mind was the general union treasury--not the funds donated by union members of their own free and knowing choice. . . ."

As a result of the Pipefitters' decision, it would appear that a corporation without violating the Corrupt Practices Act could organize a fund for political purposes and solicit employee contributions provided that the contributions were voluntarily contributed without violating the Corrupt Practices Act.

It is our opinion that the reasoning of the Pipefitters' decision is persuasive and that it would, therefore, not be a violation of § 129.070, RSMo 1969, for any corporation organized and doing business under and by virtue of the laws of Missouri to organize and support political action committees as defined above.

It is our understanding that the employees being solicited must be informed by the solicitor of the political purpose of the PAC and of their right not to contribute. Also, there are no rewards or reprisals which result as a consequence of any employee's decision to contribute or not to contribute to the PAC. It appears that such PACs involve no threat of discharge for reasons of the political opinions of the employee. It is our understanding that the money contributed to candidates or committees by PACs would come solely from voluntary contributions of members, and not from the corporations. Therefore, the operation of such PACs does not involve the subscription of any corporate money to any campaign fund of any party or person in violation of the terms of the statute.

While it is our understanding that corporations may make advances to PACs for the purpose of meeting PAC expenses of establishment, operation, and solicitation in collection of contributions, the corporations must be reimbursed for all such advances from the separate account of the PACs (i.e. from the voluntary contributions of members). Furthermore, interest must be paid to corporations if such reimbursement is delayed longer

Honorable John Buechner

than thirty days. Also, corporations must be reimbursed by the PACs for the use of facilities and for time spent by employees engaged in solicitation on company time. Therefore, it would appear that no corporate money would be consumed in the operation of the PAC, and that all PAC expenses are ultimately paid from the voluntary contributions of members. As a result, the provisions of § 129.070, RSMo 1969, would not be violated.

The establishment and operation of PACs, as herein described, appear to be the mere creation of a vehicle through which individuals may contribute funds to political candidates or committees. The recipients of PAC contributions are chosen by the members of the executive committees of the PACs, who are elected by the members of the PACs themselves. As a result, the corporations have no power to determine which candidates or committees will receive the monies contributed by PAC members.

In summary, the establishment and operation of PACs, as herein described, by a corporation organized and doing business under and by virtue of the laws of Missouri does not violate the provisions of § 129.070, RSMo 1969.

It is the opinion of this office that it would be lawful under the provisions of § 129.070, RSMo 1969, for a corporation organized and doing business under and by virtue of the laws of Missouri to organize and support political action committees as herein described.

Yours very truly,



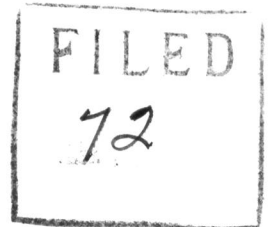
JOHN ASHCROFT
Attorney General

Enclosure: Op. Ltr. No. 73,
5/3/78, Proffer

February 28, 1978

OPINION LETTER NO. 72
Answer by Letter - Burns

Honorable Gerry Durnell
State Representative, District 149
Room 101-D, Capitol Building
Jefferson City, Missouri 65101



Dear Representative Durnell:

This is in answer to your opinion request reading as follows:

"My question is whether it is necessary for a state representative to live in the legislative district from which he wishes to be elected for at least one year, if the person has been a legal resident of the county within which the entire district is located for a period of at least two years prior to the time he files for office."

We believe that your request is answered by Opinion No. 104, rendered February 7, 1967, to Representative Richard J. Rabbitt. The conclusion in such opinion was applicable to candidates for the 74th General Assembly in view of the fact that state representative districts were reapportioned in 1966.

However, we believe it clear that in the body of the opinion an answer to your present request is found. On page 3 of the Rabbitt opinion, in referring to the use of the phrase "county or district" in Article III, Section 4 of the Constitution of Missouri, such opinion holds:

Honorable Gerry Durnell

"Examination of this section of the Constitution shows that the language 'county or district' is used three times in the section. The first two times it seems clear that where representative districts have been established for more than one year the representative to be qualified must be a voter for two years and a resident of his district for one year. . . ."

This is a specific ruling and holding that when representative districts have been established for more than one year as is the factual situation in the present case, a representative to be qualified must be a voter for two years and a resident of the district he wishes to represent for one year.

Further, the sentence in such opinion preceding the conclusion provides as follows:

". . . Manifestly after reapportionment, representatives so chosen who do not live within their district would be required to establish residence within their district before they would be qualified at a subsequent term."

We believe it to be clear from the holding in Opinion No. 104-1967 that where representative districts have been established for more than one year prior to an election a candidate must have resided in the district in which he wishes to run for office one year prior to the date of the election.

We enclose a copy of Opinion No. 104-1967.

Very truly yours,

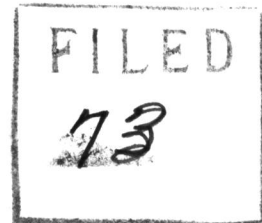
JOHN ASHCROFT
Attorney General

Enclosure: Op. No. 104,
2/7/67, Rabbitt

May 3, 1978

OPINION LETTER NO. 73

Honorable Marvin Proffer
State Representative, District 155
Rural Route 1
Jackson, Missouri 63755



Dear Representative Proffer:

This letter is in response to your request for an opinion of this office which asks:

"May a corporate employer, which has employees in the state of Missouri subject to the National Labor Relations Act, participate in a campaign in connection with a change in the Missouri constitution which would prohibit the execution or enforcement of an agreement requiring membership in or financial support of a labor organization as a condition of employment?"

Section 129.075, RSMo, is presently effective. In this respect, see our Opinion No. 86-1978, copy enclosed. Such section provides:

"Notwithstanding the provisions of this chapter prohibiting corporations from participating in political actions and in contributing to candidates, it shall not be unlawful for such corporation to participate in any campaign in connection with a change in any law directly affecting such corporation."

Honorable Marvin Proffer

It is not the function of this office to determine questions of federal law.

29 U.S.C.A. § 164(b), provides as follows:

"Nothing in this subchapter shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law."

Therefore, it appears that the adoption of a "right to work law" in this state would redefine for employers in Missouri subject to the National Labor Relations Act the scope of their obligation to bargain collectively with their employees. Thus, it is our view that such a proposed change in the Missouri Constitution would directly affect such a corporate employer under the provisions of Section 129.075.

We also wish to point out that Senate Bill No. 839, Second Regular Session, 79th General Assembly, has been truly agreed to and finally passed and sent to the Governor for his approval, and, if approved, will as of August 13, 1978, repeal Sections 129.070 and 129.075, RSMo, as well as certain other sections designated therein. In addition, if such bill is approved by the Governor, certain other sections in Chapter 129 will be repealed effective September 8, 1978. New provisions relating to the subject of campaign practices will, if such bill is approved, be respectively effective on such dates. Therefore, if such bill is approved, after such dates, the provision of Senate Bill No. 839 will have to be considered.

Further, the United States Supreme Court in the case of First National Bank of Boston v. Bellotti, 46 LW 4371 (April 26, 1978) held unconstitutional a Massachusetts statute which prohibited corporations incorporated in or doing business in Massachusetts from making contributions or expenditures for the purpose of influencing or affecting the vote on any question submitted to the voters other than a question materially affecting any of the property, business or assets of the corporation.

We conclude that, in these premises, a proposed change in the Missouri Constitution providing a "right to work law" would

Honorable Marvin Proffer

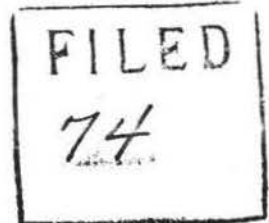
directly affect a corporate employer having employees in the State of Missouri subject to the National Labor Relations Act, and such corporate employer would be able to participate in a campaign to support such a constitutional amendment under the provisions of Section 129.075, RSMo.

Very truly yours,

JOHN ASHCROFT
Attorney General

Enclosure: Op. Ltr. No. 86,
3/22/78, Douth

February 27, 1978



Honorable Thomas M. Keyes
State Auditor
State Capitol Building
Jefferson City, Missouri 65101

Dear Mr. Keyes:

Recently you requested official opinions in connection with the registration of refunding bonds of Reorganized School District No. R-I of Jefferson County and of Reorganized School District No. 4 of Jackson County. I responded by saying that we would be unable to offer an opinion to you by February 23, 1978, concerning the R-I issue in light of the complexities of the issues involved.

In the interim we have been able to examine the questions concerning the refunding bonds in each case and are now in a position to recommend that you register the same as provided by law. My view is that these two refunding bond issues are identical with respect to the questions which were raised by this office in connection with certain refunding bonds of the School District of Sedalia, Missouri, which is developed in Opinion No. 204 issued by this office in 1977. It is my view that Opinion No. 204 applies to the circumstances which are described in your letters in connection with Reorganized School District No. R-I of Jefferson County and Reorganized School District No. 4 of Jackson County (Blue Springs).

I further note that the refunding bonds are being restructured in each case so that the interest rate on the portion of refunding bonds designated for each series being refunded will not exceed the average rate of the outstanding issues. The bond resolutions will have schedules attached which set out the portions of the refunding bonds being issued to refund specific series of bonds along with the average annual interest rate of the outstanding bonds. Based upon this restructuring, it is my view that you may register the refunding bonds about which you have inquired.

Very truly yours,

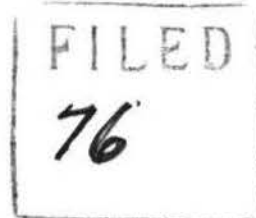
John Ashcroft
Attorney General

March 6, 1978

OPINION LETTER NO. 76
Answer by Letter - Klaffenbach

Honorable J. B. Banks
Missouri Senate, District 5

Honorable Richard M. Webster
Missouri Senate, District 32
State Capitol Building
Jefferson City, Missouri 65101



Gentlemen:

This is in answer to your requests for an opinion of this office. The questions as stated are as follows:

"1. Under the provisions of section 51 of article IV of the constitution of Missouri, when a person serving in an appointive position for a term certain is reappointed to that position for an additional term at the expiration of the first term, and when the Senate is in session, does such person serve as a continuation of the first term until such time as his reappointment is confirmed, or does his second term commence immediately upon appointment subject to termination if consent is not given?

"2. When a person serving in an appointive position for a term certain is reappointed to that position for an additional term at the expiration of the first term, and when the Senate is in session, but the reappointment is withdrawn by the governor prior to

Honorable J. B. Banks
Honorable Richard M. Webster

senate action or confirmation, but more than thirty (30) days after the appointment was submitted to the senate, does the withdrawal of the appointment create a tolling of the provisions of article IV, section 51 specifying a time period for confirmation of the first term? Or did the right to serve terminate thirty (30) days after the convening of the senate with no confirmation of the reappointment being made?

"3. Under the circumstances outlined above:

(a) Would such person be eligible for another appointment to the same position notwithstanding the fact that the senate had failed to act on the prior appointment within thirty (30) days after the submission thereof?

(b) If not, would the fact that such person would not be eligible for a later such appointment affect the right, if any, as the person otherwise would have to occupy the position until a successor is appointed and qualified?

"4. Is there any limit to how long a person can continue to serve pending the appointment and qualification of a successor?"

The facts stated by Senator Banks which we assume to be complete and correct for the purposes of this opinion are as follows:

"Governor Bond appointed Judy Svetanics to the St. Louis City Board of Election Commissioners for a term beginning on January 16, 1973, and ending on January 15, 1977, and she was duly confirmed by the senate. At the end of her first four-year term, Governor Teasdale reappointed her and submitted her name for confirmation on April 29, 1977. Before the Senate voted on confirmation the governor withdrew her name on June 6, 1977. She continued to serve on the board. When the general assembly was called into special session, Governor Teasdale again submitted her name

Honorable J. B. Banks
Honorable Richard M. Webster

on August 10, 1977. The name was withdrawn by the governor for a second time prior to senate confirmation on August 15, 1977. Mrs. Svetanics continues to serve on the board."

The facts stated by Senator Webster, which we assume to be complete and correct for the purposes of this opinion, are:

"1. The message received from the Governor, dated April 29, 1977, appointing Mrs. Svetanics to succeed herself as a member of the Election Commission of the City of St. Louis;

"2. A letter dated June 6, from the Governor, withdrawing that appointment;

"3. A letter dated June 13, signed by the Secretary of the Senate, returning the Governor's appointment;

"4. A letter dated August 10, 1977, in which the Governor reappointed Judy Svetanics as a member of the St. Louis Board of Election Commissioners to succeed herself;

"5. A letter dated August 15, 1977, from the Governor, withdrawing the appointment of Judy Svetanics to succeed herself;

"6. A letter of February 14, 1978, in which the Governor sought to appoint Mrs. Svetanics for the third time to succeed herself;

"7. A series of entries from the Senate Journal showing the official receipt of the attached documents.

"It should be borne in mind that Mrs. Svetanics was a holdover official, having been appointed by a previous Governor. The Senate was in session on April 29, 1977, at the time of her first appointment by Governor Teasdale, as well as on June 6, 1977, at the time of the withdrawal.

Honorable J. B. Banks
Honorable Richard M. Webster

"The Senate went into session at 2 p.m. on August 10, 1977. Immediately after the prayer by the Chaplain and roll call, the message from the Governor was read as it appears in the Journal. There is a question as to whether or not the appointment was physically received in the office of the Secretary of the Senate prior to 2 p.m., August 10, 1977. The general consensus, however, is that it did. If this is not a significant matter, further evidence need not be taken by the Committee. If it is, the Committee can proceed to seek to find out the exact moment that the appointment was received. It is known that it was brought into the chamber by Mrs. Ramsey so that it might be read during the very beginning portion of the session.

"The Senate was in session at the time Mrs. Svetanics' appointment was withdrawn on August 15. The Senate was in session at the time Mrs. Svetanics' appointment was made again on February 14, 1978."

We enclose copies of our Opinions No. 226-1977, No. 203-1977 and No. 182-1977, which are applicable to questions you present.

For sake of brevity we will not repeat the substance of those opinions, however, we will apply the views we expressed therein to the questions you ask. In answer to your first question, when a person who is serving in an appointive position for a term certain is reappointed to that position for an additional term beginning with the expiration of the first term when the Senate is in session such appointment is simply a "nomination". In such case the incumbent who is already serving as a holdover in office continues to hold over until such appointment is confirmed by the Senate or the Senate rejects the nomination or fails to act on the nomination during such session if the nomination is not withdrawn before adjournment.

In answer to your second question, the previous opinions of this office indicate that it is our view that an appointment made during a session of the Senate is merely a nomination and is not subject to the thirty (30) day limitation of Section 51 of Article IV of the Missouri Constitution. Therefore, a withdrawal

Honorable J. B. Banks
Honorable Richard M. Webster

of a nomination made during a session of the Senate may take place before the Senate rejects the nomination or confirms the nomination during such session.

We believe our answer stated above also answers your third question. That is, we have stated that the thirty (30) day limitation is not applicable to nominations during a session and therefore a proper withdrawal would be effective so that the person's name could be resubmitted at another time.

In answer to your fourth question, it is our view that there is no limit as to how long a person holding over under Section 12 of Article VII of the Missouri Constitution may continue to serve pending the appointment and qualification of a successor.

Senator Webster has submitted several additional questions. The first of Senator Webster's questions asks whether the individual's acts as a member of the St. Louis City Board of Election Commissioners were legal after the withdrawal by the Governor of her name on June 6, 1977. We note that the Senate was in session on such date. As pointed out above, it is our view the withdrawal of her name on June 6 would not have terminated her service as a member of the board. We have concluded that such a withdrawal under these circumstances would not have affected such officer's right to continue in office as a holdover. In any event, it is also our view that even if such an officer were not acting as a de jure officer, the fact that such officer would be a de facto officer would not affect the validity of such officer's acts. This is because it is a recognized rule of law that the acts of a de facto officer will generally be held to be lawful because such rule provides the needed protection for the public. See Fort Osage Drainage District v. Jackson County, 275 S.W.2d 326 (Mo. 1955).

Senator Webster's second question asks concerning the significance of the August 10 appointment, which we refer to as a "nomination" since it was made during a session of the Senate. The first part of such question asks if the appointment was made prior to 2 p.m., August 10, 1977, the date we are informed that the session convened, whether the appointment could be withdrawn by the Governor. We are advised that it appears that the appointment was received in the Office of the Secretary of the Senate after the Senate convened although some doubt exists. Upon inquiry of the Office of the Secretary of State we are informed that no appointment of such person was filed with the Secretary of State's office in August of 1977. Such a filing is required under Section 28.060, RSMo, and would have been evidence, if such filing existed, of an appointment prior to the beginning

Honorable J. B. Banks
Honorable Richard M. Webster

of the session. It is our view in the absence of such a filing that the appointment or nomination transmitted to the Senate at the beginning of the session constituted a "nomination" subject to Senate approval. The mere fact such nomination may have been received by the Secretary of the Senate slightly prior to the precise hour the Senate convened does not alter the fact that it was clearly intended to be a mere nomination to be taken up by the Senate during the session. Therefore, such appointment could be withdrawn by the Governor. The second part of Senator Webster's second question asks whether the appointment could be withdrawn by the Governor if the appointment had been received by the Senate after 2 p.m., August 10, 1977, the hour of convening of the Senate. In view of the answer to the first part of Senator Webster's second question it is clear that the Governor has the power of withdrawal of a nomination made after the beginning of the session.

Very truly yours,

JOHN ASHCROFT
Attorney General

Enclosures: Op. Ltr. No. 182
8-17-77, Merrell

Op. No. 203
11-22-77, Banks

Op. No. 226
11-22-77, Webster

Attorney General of Missouri

JOHN ASHCROFT
ATTORNEY GENERAL

JEFFERSON CITY

(314) 751-3321

65101

March 15, 1978

OPINION LETTER NO. 78

Honorable Carrol J. McCubbin
State Representative, District 118
c/o House Post Office
Capitol Building
Jefferson City, Missouri 65101

Dear Representative McCubbin:

This letter is in response to your question asking whether a city can enter into a mutual agreement with a fire protection district for fire protection services and whether a city can enter into a mutual agreement with a not-for-profit fire association for fire services. Apparently, your question also asks whether or not the three types of entities noted, the city, the fire protection district and a not-for-profit fire association may enter into a joint agreement.

In our Opinion No. 48-1972, this office recognized that Section 321.220, RSMo, authorized a fire protection district to contract with any person, partnership, association or corporation, public or private, affecting the affairs of the district. That opinion also recognized that there are certain limitations with respect to such contracts in that there are some functions which cannot be performed by contract.

Under Sections 70.210, et seq., RSMo, political subdivisions as defined therein, including cities and fire districts, have the authority to contract and cooperate with other municipalities or political subdivisions, or with an elective or appointive official thereof, or with a duly authorized agency of the United States or of the State of Missouri, or with other states or their municipalities or political subdivisions, or with any private person, firm,

Honorable Carrol J. McCubbin

association or corporation, for the planning, development, construction, acquisition or operation of any public improvement or facility or for a common service; provided that the subject and purposes of any such contract or cooperative action made and entered into by such municipality or political subdivision must be within the scope of the powers of such municipality or political subdivision.

It seems clear from such section that a cooperative agreement can be entered into between a fire protection district and a city or between a city and a not-for-profit fire protection association or by a city, a fire protection district and such a not-for-profit association.

We do not pass upon the propriety of any particular agreement. Further, we assume, without deciding, that the not-for-profit association is within its powers in entering into such agreements.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John Ashcroft", with a long horizontal flourish extending to the right.

JOHN ASHCROFT
Attorney General

Attorney General of Missouri

JOHN ASHCROFT
ATTORNEY GENERAL

JEFFERSON CITY

65101

(314) 751-3321

April 25, 1978

OPINION LETTER NO. 82

Honorable Bradshaw Smith
Prosecuting Attorney
Cape Girardeau County
112-A North Main Street
Cape Girardeau, Missouri 63701

Dear Mr. Smith:

This letter is in response to your request for an opinion asking as follows:

"The Cape Girardeau County Court has adopted an official master plan pursuant to Section 64.815 RSMo Supp. 1975. The County Planning Commission requests an opinion on the extent of its regulatory powers, in any, under Section 64.820 RSMo. 1969. The statute states in part:

'From and after the adoption of the official master plan or portion thereof and its proper certification and recording, thereafter no improvements of a type embraced within the recommendations of the official master plan, or part thereof, shall be constructed or authorized without first submitting the proposed plans thereof to the county planning commission and receiving the written approval or recommendations of the commission. . . .'

Honorable Bradshaw Smith

"The specific questions of the Cape Girardeau County Planning Commission are as follows:

"(1) Is an official master plan adopted by the County Court a land use control device or merely a guide to county development?

"(2) If the County Planning Commission possesses regulatory powers under Section 64.820 RSMo. 1969, what is the extent of its authority in the event its recommendations are not followed?

"(3) What remedies are available to the County Planning Commission in the event its recommendations are not followed?"

We note that your questions are very broad and we do not feel obliged to issue a comprehensive opinion interpreting the provisions in question. Further, we are not in a position to attempt to resolve particular questions that may be before the Commission.

After planning is approved by the voters under Section 62.800, RSMo, a planning commission is established under Section 64.805, RSMo, which has the general powers set out in Section 64.810, RSMo. Under Section 64.815, RSMo Supp. 1975, the county planning commission must prepare a master plan of the county which may be adopted after a public hearing by the county court in whole or in part and may be subsequently amended or extended by the county court after a public hearing. After the adoption of the plan or part thereof by a resolution carried by not less than a majority of the full membership of the county court an attested copy must be certified by the county court to the recorder of deeds and to the clerk of each incorporated area covered by the plan or part thereof.

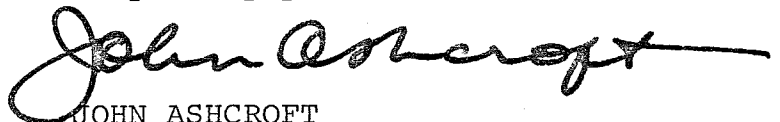
Under Section 62.820, RSMo, after the adoption of a master plan or portion thereof and its proper certification and recording "no improvement of a type embraced within the recommendations of the official master plan, or part thereof, shall be constructed or authorized without first submitting the proposed plans thereof to the county planning commission and receiving the written approval or recommendations of the commission." This requirement, however, is waived if the county planning commission fails to make its report and recommendations within forty-five days after receipt of the proposed plans.

Honorable Bradshaw Smith

It is clear that under these statutes the official master plan, once adopted by the county court, is more than a guide to county development. It is essentially a land use control device which can be enforced as provided in Section 64.895, RSMo. Under Section 64.825, the county planning commission may also prepare, with the approval of the county court as part of the official master plan, regulations governing subdivisions of land in unincorporated areas and may change the same from time to time. Such section sets out the scope of such regulations. It is also clear that once such regulations are approved by the county court as part of the official master plan after a public hearing, such regulations also fall within the enforcement provisions of Section 64.895.

The difficulty in the question you present comes in interpreting the provisions of Section 64.820. Under that section (which is similar to Section 64.570, RSMo), as we have noted, the planning commission must give its approval or recommendations with respect to improvements which are to be constructed or authorized of a type embraced within the recommendations of the official master plan. We find no case or other authority to guide us in determining the authority of the commission under Section 64.820. We are of the view, however, that the authority of the commission under such section to disapprove such improvements must relate to requirements existing by reason of the master plan or the regulations promulgated pursuant to Section 64.825, and cannot be based upon requirements not properly found in the master plan as adopted, amended or as extended by regulation. See 82 Am.Jur.2d, Zoning and Planning §167, pp. 669-671. In other words, it is our view that the regulatory powers of the county planning commission are limited to those areas set out under the master plan and regulations pursuant thereto.

Very truly yours,

A handwritten signature in black ink, appearing to read "John Ashcroft", with a stylized, flowing script.

JOHN ASHCROFT
Attorney General

ELECTIONS:
CITY ELECTIONS:

When a school district holds a regular election on the first Tuesday of April, 1978, and the City of Springfield, a constitutional charter city, submits a special question at such election the costs of the election are to be paid pursuant to Section 115.067, (Section 2.520 of SSHB No. 101, First Regular Session, 79th General Assembly), of the Comprehensive Election Act of 1977.

OPINION NO. 84

March 28, 1978

Honorable Theodore L. Johnson, III
Greene County Counselor
1002 Plaza Towers
Springfield, Missouri 65804



Dear Mr. Johnson:

This opinion is in response to your question asking:

"A question has arisen concerning the interpretation of 2.520 S.S.H.B. 101 (The Comprehensive Election Act passed by the 79th General Assembly).

"When a school district holds a regularly scheduled election to fill positions on the Board of Education on the first Tuesday in April, and a Charter city holds an election, that was not required by the Charter, on the same day, how is the cost of the election to be allocated and paid?"

You also state:

"The City of Springfield is a Charter city whose Charter requires it to conduct an election for City Council in April of odd number of years. The Springfield R-12 School District is an Urban School District which holds an election for School Board directors in April of even number of years. Section 2.520 states that, 'when any political subdivision or special district holds a regularly scheduled election and another political subdivision or special district submits a

Honorable Theodore L. Johnson, III

special question or candidate at the election, all costs of the election, except ballot printing costs, shall be paid from the general revenue of the political subdivision or special district holding the regularly scheduled election."

The provisions of the Comprehensive Election Act of 1977 (SSHB No. 101, First Regular Session, 79th General Assembly) are now found in Sections 115.001 to 115.641 and Sections 51.450 to 51.460. The effective date of the Act is January 1, 1978.

Section 2.520 of the Act to which you refer has been numbered Section 115.067. Such section provides:

"Except as provided in sections 115.069 and 115.073, when any political subdivision or special district holds a regularly scheduled election and another political subdivision or special district submits a special question or candidate at the election, all costs of the election, except ballot printing costs, shall be paid from the general revenue of the political subdivision or special district holding the regularly scheduled election. If a special candidate or question is printed on the same ballot as the candidates and questions of the political subdivision or special district holding a regularly scheduled election, ballot printing costs shall be paid proportionally from the general revenue of each political subdivision and special district submitting a candidate or question on the ballot. If a special candidate or question and the candidates and questions of the political subdivision or special district holding a regularly scheduled election are printed on different ballots, each political subdivision and special district submitting a candidate or question on a ballot shall pay the cost of printing its own ballots."

Section 2.515 of the Act, which is now numbered Section 115.065 provides:

"1. Except as provided in sections 115.067, 115.069, 115.071, and 115.073, when any question or candidate is submitted to a vote by two or more political subdivisions or special districts at the same election, all costs of the election shall be paid proportionally from the general revenues of all political subdivisions and special districts submitting a question or candidate at the election.

Honorable Theodore L. Johnson, III

"2. Proportional election costs paid under the provisions of subsection 1 of this section and section 115.067 shall be assessed by charging each political subdivision and special district the same percentage of the total cost of the election as the number of registered voters of the political subdivision or special district on the day of the election is to the total number of registered voters on the day of the election, derived by adding together the number of registered voters in each political subdivision and special district submitting a question or candidate at the election."

It is our understanding that the dates of elections of the school district of Springfield R-12, an urban school district, are governed by Section 162.481(2), RSMo, and that the school directors are elected biennially on the first Tuesday in April of even numbered years.

There is no doubt that school districts and municipalities come under the provisions of the Comprehensive Election Act.

Section 6.001 of the Act which is now numbered Section 115.121 provides:

"1. The general election day shall be the first Tuesday after the first Monday in November of even-numbered years.

"2. The primary election day shall be the first Tuesday after the first Monday in August of even-numbered years.

"3. The municipal election day shall be the first Tuesday in April each year."

Section 6.005 of the Act which is now numbered Section 115.123 provides:

"All public elections shall be held on Tuesday. Except bond elections necessitated by fire, vandalism or natural disaster, except elections for which ownership of real property is required by law for voting, except special elections to fill vacancies and to decide tie votes or election contests, and except as otherwise expressly provided by city or county charter, all public elections shall be held on the general election day, the primary election day, the municipal election day, the first Tuesday

Honorable Theodore L. Johnson, III

after the first Monday in February, June, August, October or November or with an election on another day expressly provided by city or county charter. After January 1, 1978, no city or county shall adopt a charter or charter amendment which calls an election on any day other than the February, April, June, August or November election days specified in this section."

Insofar as the City of Springfield is concerned, the election to be held in April, 1978, at which a charter amendment is to be submitted is not a regularly scheduled election for such city, but is a regularly scheduled election for the school district at which the City of Springfield submits a special question, i.e., charter amendments.

Section 115.067 refers to the holding of a "regularly scheduled election" by a political subdivision or special district and the submission of a "special question or candidate at the election" by another political subdivision or special district. Therefore, it is our view that the plain language of Section 115.067 applies in this instance and the costs are to be paid in accordance with such section.

CONCLUSION

It is the opinion of this office that when a school district holds a regular election on the first Tuesday of April, 1978, and the City of Springfield, a constitutional charter city, submits a special question at such election the costs of the election are to be paid pursuant to Section 115.067, (Section 2.520 of SSHB No. 101, First Regular Session, 79th General Assembly), of the Comprehensive Election Act of 1977.

The foregoing opinion, which I hereby approve, was prepared by my assistant, John C. Klaffenbach.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John Ashcroft", with a long horizontal flourish extending to the right.

JOHN ASHCROFT
Attorney General

Attorney General of Missouri

JOHN ASHCROFT
ATTORNEY GENERAL

JEFFERSON CITY

(314) 751-3321

65101

March 22, 1978

OPINION LETTER NO. 86

Honorable Sam Doult
State Representative, District 40
Room 235B, State Capitol Building
Jefferson City, Missouri 65101

Dear Representative Doult:

This letter is in response to your question asking:

"What is the allowable limit a candidate
may spend in the upcoming April 2 election?"

The campaign expenditure provisions of the Missouri Campaign Finance and Disclosure Act, Section 130.010 et seq., RSMo, 1975, were held to be unconstitutional by the Missouri Supreme Court in its decision dated February 1, 1978, in the case of Labor's Educational and Political Club - Independent, et al. v. Danforth, Missouri Elections Commission, et al., No. 59806. As a result of such finding the court held that the remaining portions of this act were not severable and accordingly invalidated the entire law. The invalidated law had repealed, among other sections, Section 129.100, RSMo, which had set limits for expenditures by candidates for public office to be filled by popular election.

Ordinarily, where an act expressly repealing another act and providing a substitute therefor is held to be invalid the repealing clause is also held invalid. State ex rel. Crouse v. Mills, 133 S.W. 22 (Mo. 1911). Thus the rule of law indicates that the provisions of Section 129.100 are in effect.

Honorable Sam Douth

However, although we are of the view that Section 129.100 is still in effect we believe that the holding of the court in Labor's Educational and Political Club - Independent v. Danforth, supra, could arguably apply to Section 129.100. Although we are not prepared to say that Section 129.100 is unconstitutional under such holding, we are of the view that there are a number of arguments which could be made that Section 129.100 suffers from the infirmities found to exist in the Missouri Campaign Finance and Disclosure Act, Section 130.010, et seq., RSMo Supp. 1975, by the courts in Labor's Educational and Political Club - Independent v. Danforth, supra, and Buckley v. Valeo, 424 U.S. 1, 46 L.Ed.2d 659 (1976).

Very truly yours,

A handwritten signature in dark ink, appearing to read "John Ashcroft", with a long, sweeping horizontal stroke extending to the right.

JOHN ASHCROFT
Attorney General

August 24, 1978

OPINION LETTER NO. 88

Answer by Letter Robinson

Honorable Charles H. Baker
Prosecuting Attorney
Dunklin County Courthouse
Kennett, Missouri 63857



Dear Mr. Baker:

Your recent request for an official opinion reads as follows:

"Does the County Court of a third class county have the power to give three ambulances purchased with Revenue Sharings funds with assistance from the Emergency Medical Services of Missouri to the Dunklin County Ambulance District, an ambulance district formed under Sections 190.005 et seq RSMo. with the consent of the Division of Health?

"In any event, is it necessary that notice of the gift or sale be published and bids invited?"

It is our opinion that the first part of your question, namely, may the county court make a gift of the ambulances to the ambulance district, may be answered with reference to previous opinions of this office.

On May 12, 1952, this office rendered an opinion to Roger Hibbard, Prosecuting Attorney for Marion County, copy enclosed. In that opinion we held that the County Court of Marion County had no authority to contribute county funds to aid in the construction of a sewer system for the City of Hannibal, Missouri. Also, on July 8, 1954, this office rendered an opinion to Dick B. Dale, Prosecuting Attorney of Ray County, copy enclosed, in which

Honorable Charles H. Baker

this office held that the County Court of Ray County had no authority to make donations to the City of Richmond for a city park. Further, on March 27, 1957, this office rendered an opinion in which we held that the County Court of Howell County may not contribute county funds to the City of West Plains to erect a city hospital, copy enclosed.

The rationale set forth in the above opinions is that a county court has only such authority as is expressly granted to it by statute and there is no statutory authority for making any of the gifts involved. Likewise, there exists no statutory authority that empowers the county courts to donate ambulances to an ambulance district.

Concerning your question of whether or not the court has the power to sell its ambulances, it is our opinion that it does have this power. Under Section 49.270, RSMo 1969, the county court has the power:

" . . . to sell and cause to be conveyed any real estate, goods or chattels belonging to the county, appropriating the proceeds of such sale to the use of the same, . . . "

Thus, clearly, the court has the power to sell its ambulances.

Regarding your question as to whether or not bids must be taken for the sale of these ambulances, it is our opinion that bids are not legally required. Presumably, if the legislature had intended to require competitive bidding procedures in this situation, it would have provided therefor. Angel v. Behnke, 337 N.E.2d 503, 511 (Ind.App. 1975).

We would, however, point out that the county court is the trustee of county property with limited authority and in disposing of this property they are:

" . . . required to act with reasonable skill and diligence, and to discharge their duties with that prudence, caution and attention which careful men usually exercise in the management of their own affairs. . . . "
Butler County, Mo. v. Campbell, 182 S.W.2d 589, 592 (Mo. 1944).

Thus, in dealing with county property, the county court must exercise the utmost good faith, fidelity and integrity. They must use their best judgment and skill and do everything reasonably within their power to obtain the best price for that property.

Honorable Charles H. Baker

Malcom v. Webb, 86 S.E.2d 489 (Ga. 1955). On August 14, 1948, this office rendered an opinion to Marvin C. Hopper, copy enclosed, in which we held that the County Court of Linn County could not give a bridge to a road district of another county nor sell it for nominal consideration, but was obliged to get the best price for the bridge. Likewise, the county is obliged to get the best price for the ambulances.

It must be further added that it is this office's understanding that the county court paid 34.7% of the cost of the ambulances while the Missouri Division of Health paid the rest of the cost and that the county court may transfer title to the ambulances only with the concurrence of the Division of Health. If this concurrence is granted by the Division, then it is our opinion that the ambulances may be sold to the ambulance district so that 34.7% of their fair market value at the time of transfer of title is received by the county.

Very truly yours,

JOHN ASHCROFT
Attorney General

Enclosures: Op. No. 40,
5-12-52, Hibbard

Op. No. 21,
7-8-54, Dale

Op. No. 63,
3-27-57, Moore

Op. No. 42,
8-19-48, Hopper

March 15, 1978

OPINION LETTER NO. 89
Answer by Letter - Klaffenbach

Honorable Robert Fowler
State Representative, 69th District
House Post Office
State Capitol Building
Jefferson City, Missouri 65101



Dear Representative Fowler:

This letter is in response to your question asking:

"Is it permissible for a husband and wife to seek elective offices in the same fourth class municipality? One as a member of the Board of Aldermen and one to the Collector's office."

Under Section 79.050, RSMo, aldermen of such a city are elected and the collector of the city may be elected or appointed. That is, if the board of aldermen does not provide for the appointment of a collector, after receiving voter approval, the collector shall be elected.

You have stated that the collector in this instance is elected. We know of no statute which prohibits a husband and a wife from seeking the respective offices of alderman and collector in such a city. The nepotism provision of the Constitution, Section 6, Article VII, in our view is not applicable and does not prohibit a husband and wife from seeking such elective offices.

Very truly yours,

JOHN ASHCROFT
Attorney General

DEPARTMENT OF MENTAL HEALTH:
STATE FUNDS:

1. Revenue generated by activities of facilities of the Department of Mental Health, such as the operation of commissaries, canteens, and work activity centers, should be deposited into the state treasury and credited to the general revenue fund.

2. The expenditure of money received from such activities should be controlled by the legislature through the appropriations process.

3. Subject to the direction of the director of the Department of Mental Health, a superintendent of a mental health facility may permit a not-for-profit corporation to operate a commissary or cafeteria on the premises for the benefit of the facility patients.

OPINION NO. 91

September 26, 1978

Honorable Thomas M. Keyes
State Auditor
Capitol Building
Jefferson City, Missouri 65101



Dear Mr. Keyes:

This official opinion is in response to your request for rulings on the following questions:

"1. Should revenue generated by various auxiliary enterprises operated by the Department of Mental Health, such as commissaries, canteens, and work activities centers, be deposited into the state treasury and credited to the general revenue fund?

"2. Should the expenditure of money received from such auxiliary enterprises be controlled by the legislature through the appropriations process?

"3. Is it proper for the superintendent of a mental health facility to permit a not-for-profit corporation to operate a commissary or canteen at a mental health facility?"

1.

According to the facts that you have presented in regards to your first question, some of the facilities of the Department of Mental Health operate commissaries, canteens, and work activity centers. The profits derived from the activities have been deposited into a special account maintained by the Department of Mental Health.¹

We are unable to find legal authority for the Department of Mental Health to maintain such an account. Rather, state constitutional and statutory authority requires that revenue received by the State and its agencies shall go into the state treasury. Article III, Sec. 36, and Article IV, Sec. 15, Constitution of Missouri; §33.080, RSMo 1969.

Subsection 2 of §136.010, RSMo 1969, provides that all money payable to the State shall be promptly transmitted to the Division of Collection of the Department of Revenue. Although certain exceptions are enumerated, there is no exception for revenue generated by Department of Mental Health facilities. After recording receipts of the money, the State Collector of Revenue shall deposit the money with the State Treasurer pursuant to §136.110, RSMo 1969.

Thus, the revenue generated by various facilities of the Department of Mental Health is to be paid to the Division of Collection of the Department of Revenue. From there, the State Collector of Revenue is to deposit the money with the State Treasurer to the credit of the general revenue fund.

2.

Your second question involves the control of the expenditure of revenue generated by such activities. From the facts that you have presented, it appears that the profits have been placed in a special account and spent by the officials of the Department without authorization from the state legislature through the appropriation process.

Article III, Sec. 36, of the Constitution of Missouri, provides as follows:

"All revenue collected and money received by the state shall go into the treasury and the general assembly shall have no power to divert the same or to permit

¹In preparing this opinion, we disregarded facts you provided which were not pertinent to the questions you presented.

the withdrawal of money from the treasury, except in pursuance of appropriations made by law. All appropriations of money by successive general assemblies shall be made in the following order:

* * *

Fifth: For the support of eleemosynary and other state institutions."

In Article IV, Sec. 15, of the Constitution of Missouri the duties of the State Treasurer are described. He is to deposit and hold all moneys in the state treasury to the credit of the various funds to which they belong and disburse them only as provided by law. Furthermore, Article IV, Sec. 28, of the Constitution of Missouri, specifies the manner in which money may be expended from the state treasury as follows:

"No money shall be withdrawn from the state treasury except by warrant drawn in accordance with an appropriation made by law, nor shall any obligation for that payment of money be incurred unless the commissioner of administration certifies it for payment and certifies that the expenditure is within the purpose as directed by the general assembly of the appropriation and that there is in the appropriation an unencumbered balance sufficient to pay it. At the time of issuance each such certification shall be entered on the general accounting books as an encumbrance on the appropriation. No appropriation shall confer authority to incur an obligation after the termination of the fiscal period to which it relates, and every appropriation shall expire six months after the end of the period for which made."

Accordingly, §33.080, RSMo 1969, requires that money placed in the state treasury "shall be subject to appropriation by the general assembly." Furthermore, §30.170, RSMo 1969, provides that the State Treasurer shall "disburse the state moneys upon warrants drawn on the treasury according to law."

Besides not finding any legal authority for permitting the establishment of a separate account for the placement of such profits, we also do not find any legal authority for allowing the officials of the Department to expend the money they place in the special account. The revenue thus generated by the Department should be forwarded to the Division of Collection of the Department of Revenue for placement in the state treasury to the credit of the general revenue fund. The money may then only be spent from the general revenue fund in accordance with appropriations made by the legislature.

3.

Your third question seeks an opinion on the propriety of a superintendent of a mental health facility permitting a not-for-profit corporation to operate a commissary or canteen on facility premises. Although we can find no express statutory or constitutional authorization for allowing such services to be provided on the grounds of a mental health facility, it is our opinion that allowing such entities to operate commissaries or canteens in mental health facilities for the benefit of patients falls within the purposes and powers of the director of the Department and the various superintendents and regional center directors.

The Department of Mental Health was created by Article IV, Sec. 12, of the Constitution of Missouri, and the Omnibus Reorganization Act of 1974, Appendix B, Sec. 9, RSMo 1975 Supp. Article IV, Sec. 37 (a), of the Constitution, generally establishes the duties and powers of the Department as follows:

"The department of mental health shall be in charge of a director who shall be appointed by the commission, as provided by law, and by and with the advice and consent of the senate. The department shall provide treatment, care, education and training for persons suffering from mental illness or retardation, shall have administrative control of the state hospitals and other institutions and centers established for these purposes and shall administer such other programs as provided by law."

In similar language found in subsection 1 of §202.020, RSMo 1969, the Department has the duty to "provide appropriate . . . care and treatment, examination report, education and training of persons suffering from mental illness or mental retardation."

In order to carry out the purposes of the Department as enumerated in the Constitution and the statutes, the superintendents of the facilities are to have "charge, control, and management" of the entire facilities. Section 202.050 RSMo (as amended by S.B. 653, 1978). This section which outlines the duties of the superintendents confers broad authority for them to exercise in administering their facilities subject to the directives of the department director. The superintendents are, therefore, vested with high degrees of discretion in order to provide "treatment, care, education and training" for the patients residing in and served by their facilities. Art. IV, Sec. 37 (a), Constitution of Missouri.

In Attorney General's opinion letter No. 39, Ulett, March 23, 1970, a canteen operated by an independent, not-for-profit corporation on the premises of the Farmington State Hospital was determined to be exempt from the sales tax law. The writer of the opinion noted as follows about the purposes that a canteen may serve:

"Basically the purpose of the canteen is to make available certain common necessary items for purchase by the patients or families visiting the patients. All of the proceeds are then used for recreational and rehabilitation purposes. Operation of the canteen also serves as a rehabilitation function."

Services provided by volunteer individuals and organizations have traditionally been within the purview of operating public hospitals. Volunteers at the various facilities of the Department of Mental Health offer a wide range of services such as assisting patients with letter writing, transporting patients to and from community events, and buying personal items for the patients.

It is a logical extension of allowing individual persons to serve as volunteers to permitting and supervising not-for-profit corporations to provide certain services to the patients of the Department of Mental Health at minimum costs to the State.

Canteens and commissaries operated by these not-for-profit corporations serve the treatment, care, education, and training purposes for persons suffering from mental illness or retardation. The patients may purchase their own

items in the canteens rather than having volunteers purchase them outside of the facility.

Furthermore, besides having such items as candy bars, shaving gear, and soft drinks available to purchase thereby making institutional living a degree more personally acceptable, the canteens and commissaries can provide genuine opportunities for the patients to make personal decisions at a time when and in a place where such decisions are relatively uncommon. This opportunity for the patients to utilize independent discretion occurs at a time and place which, of necessity, emphasizes dependence.

Additionally, the canteens and commissaries offer the patients the opportunity to interact with persons other than those on their wards. Moreover, patients may work in the canteens in order to aid in their rehabilitation.

Thus, not-for-profit corporations which operate canteens or commissaries on the premises of Department of Mental Health facilities provide positive benefits for the patients on a scale greater than but similar to services offered by individual volunteers.

As a condition of being allowed by the superintendent to operate on the premises, the not-for-profit corporations must be required to utilize their profits to serve the patients. Equipment and supplies may be purchased with the profits and contributed directly to the facilities. Money derived from the profits and contributed for the general patient welfare at a certain facility shall be paid to the director of the Department for placement in the state treasury in the "mental health trust fund" in accordance with §202.660, RSMo 1969. The money in this fund is to be appropriated by the legislature for the purposes stated for which the money was given.

Thus, a superintendent may permit a not-for-profit corporation to operate a commissary or canteen at his mental health facility.

CONCLUSION

Therefore, it is the opinion of this office as follows:

1. Revenue generated by activities of facilities of the Department of Mental Health, such as the operation of commissaries, canteens, and work activity centers, should be deposited into the state treasury and credited to the general revenue fund.

2. The expenditure of money received from such activities should be controlled by the legislature through the appropriations process.

3. Subject to the directions of the director of the Department of Mental Health, a superintendent of a mental health facility may permit a not-for-profit corporation to operate a commissary or cafeteria on the premises for the benefit of the facility patients.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Reginald H. Turnbull.

Very truly yours,


JOHN ASHCROFT
Attorney General

Enclosure: Op. No. 39, 3/23/70 Ulett



JOHN ASHCROFT
ATTORNEY GENERAL

Attorney General of Missouri

JEFFERSON CITY

65101

(314) 751-3321

June 22, 1978

OPINION LETTER NO. 92
ADDENDUM TO OPINION NO. 299-1973

Mr. William Kenneth Carnes
Director, Department of Public Safety
621 East Capitol Street
Jefferson City, Missouri 65101

Dear Mr. Carnes:

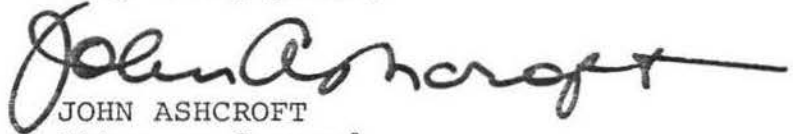
This letter is being issued as an addendum to Opinion No. 299-1973, in response to your request in which you ask for a clarification of the term "closed record" as it is used in Section 610.100, RSMo Supp. 1975. Specifically you ask "if an arrest record is closed pursuant to Section 610.100, RSMo Supp. 1975, who has access to the closed record and for what purposes." Opinion No. 299-1973 addresses itself to that issue. That opinion states that arrest records which have been closed pursuant to Section 610.100, "are available to law enforcement agencies, including the arresting agency, only for purposes of litigation, and otherwise must be closed to all persons." Opinion No. 299 reaches this conclusion because Section 610.100 contemplates that charges might be filed more than thirty days after a person is arrested. Such a charge would not be possible if the arresting agency, the prosecuting attorney and other law enforcement officials did not have access to the specific information contained in the original arrest record. A record closed pursuant to Section 610.100, therefore, is open to law enforcement officials solely for the purpose of prosecuting an individual for the charge which arose out of the arrest. A law enforcement official who does not need the information in the "closed record" to prosecute the underlying offense should not be given access to the record.

This office is aware of the opinion issued on September 9, 1975, by Keith P. Bondurant, Judge of the Circuit Court, Sixteenth Judicial Circuit Court of Missouri, in the proceeding Edwin T. S. Miller v. City of Kansas City, No. CV 76-2391. In that case Judge Bondurant held that the administrator of the Municipal Court of Kansas City was required to allow auditors for the

Mr. William Kenneth Carnes

City of Kansas City to inspect records which had been closed pursuant to Section 610.100, RSMo Supp. 1975. Since Judge Bondurant's decision was not appealed to a higher court it is binding on the parties but does not set a rule of law which is required to be followed on a statewide basis.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John Ashcroft", with a long horizontal flourish extending to the right.

JOHN ASHCROFT
Attorney General

COUNTIES:
JUVENILES:
COUNTY COURT:
COUNTY BUILDINGS:

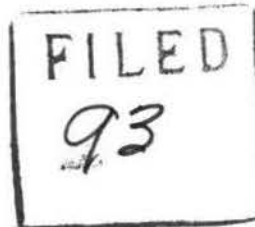
The County Court of St. Charles County acting for the county of St Charles, Missouri may under the applicable Missouri statute purchase a preexisting building

for utilization as a juvenile detention facility and that said building to be purchased may be located outside the city limits of the county seat of St. Charles County.

OPINION NO. 93

July 24, 1978

Honorable Ronald L. Boggs
Prosecuting Attorney
St. Charles County
200 North Second Street
St. Charles, Missouri 63301



Dear Mr. Boggs:

This official opinion is issued in response to your request for a ruling which request reads as follows:

"Can the County of St. Charles, Missouri, under the applicable Missouri Statutes governing the acquisitions of buildings for county purposes, legally purchase an already existing building and land presently privately owned lying within the city limits of St. Peters, a city within the County of St. Charles, but not the county seat?"

As we understand the facts, currently the juvenile detention facility in St. Charles County, Missouri does not meet federal standards. Accordingly, it was essential that some steps be taken to secure a juvenile detention facility that will comply with federal standards. As a result, on December 6, 1977, a bond proposition to acquire land and erect a juvenile detention facility within the City of St. Charles, Missouri was put to a vote of the people in St. Charles County, Missouri pursuant to Section 211.331, RSMo and Chapter 108, RSMo. That bond issue failed to pass. Subsequently, Mr. Raymond Grush, Juvenile Officer-Administrative Director for St. Charles County, Missouri located a preexisting building that was privately owned which with some renovation could be used as a juvenile detention facility.

The first question to be disposed of is whether or not St. Charles County is empowered to purchase a preexisting building

Honorable Ronald L. Boggs

as opposed to purchasing only the land for said building. In reaching a conclusion one must first look at Section 49.270, RSMo, which reads in part as follow:

"The said court shall have control and management of the property, real and personal, belonging to the county, and shall have power and authority to purchase, lease or receive by donation, any property, real or personal, for the use and benefit of the county;. . ."

This statute gives to the County Court of St. Charles County the power to purchase any real property for the use and benefit of the county. As a juvenile detention facility is for the use and benefit of the county and is further essential in order to meet federal requirements, it would seem that this statutory authorization allows St. Charles County to purchase any real property for a juvenile detention facility, including land or buildings located thereon, unless such power is further limited by some other special statute.

Section 211.331(4), RSMo, which deals specifically with juvenile detention facilities, states as follows:

"The county court or other governing body of the county is authorized to lease or to acquire by purchase, gift or devise land for such purpose, and to erect buildings thereon and to provide funds to equip and maintain the same for the subsistence and education of the children placed therein."

While there is no specific wording in the aforesaid section to authorize the purchase of a building, it is our opinion that the authority to purchase the preexisting building can be reasonably implied from the express language contained in the aforesaid section as well as Section 49.270, RSMo, previously set out above. In Shiedley v. Lynch, 95 Mo. 487, 8 S.W. 434, 437 (1888), the court stated as follows:

". . . 'In statutes, incidents are always supplied by intendments; in other words, whenever a power is given by a statute, everything necessary to the making of it effectual is given by implication.' . . ."

Since the county court is authorized by Section 49.270, RSMo, to purchase any real property and authorized by Section 211.331(4), RSMo, to purchase land and erect a building for a

Honorable Ronald L. Boggs

juvenile detention facility, the necessary implication of these powers is the power to purchase a building for a juvenile detention facility.

In addition, the word "land" has been given the common law definition in Missouri which "includes all buildings of a permanent nature standing thereon" as well as the land. Union Cent. Life Ins. Co. v. Tillery, 152 Mo. 421, 54 S.W. 220 (1899). Bituminous Casualty Corporation v. Walsh & Wells, Inc., 170 S.W.2d 117 (St.L.Ct.App. 1943).

Accordingly, it is the opinion of this office that the St. Charles County Court does have the authority and is empowered to purchase preexisting buildings for utilization as a juvenile detention facility for the county.

We believe the enclosed Opinion Letter No. 318, rendered June 17, 1971, to Wm. S. Brandom, answers your question whether the juvenile detention facility can be located outside the county seat.

CONCLUSION

Therefore, it is the opinion of this office that the County Court of St. Charles County acting for the county of St. Charles, Missouri may under the applicable Missouri statute purchase a preexisting building for utilization as a juvenile detention facility and that said building to be purchased may be located outside the city limits of the county seat of St. Charles County.

Very truly yours,



JOHN ASHCROFT
Attorney General

Enclosure: Op. Ltr. No. 318,
6/17/71. Brandom

TAXATION (CITY SALES TAX):
BALLOTS:
ELECTIONS:
CITY ELECTIONS:

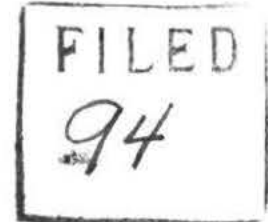
Section 8.120 of the Comprehensive Election Act of 1977 (SSHB No. 101, First Regular Session, 79th General Assembly) provides for the form of the ballot submission with respect

to city sales tax elections notwithstanding the provisions of Section 94.510, RSMo, as amended in 1977.

OPINION NO. 94

April 17, 1978

Honorable William Stoner
State Representative, District 147
House Post Office
State Capitol Building
Jefferson City, Missouri 65101



Dear Representative Stoner:

This opinion is in response to your question asking:

"Does Section 8.120 of the Comprehensive Election Act of 1977 repeal by implication that portion of Section 94.510 RSMo. with respect to language required for a ballot for a City Sales Tax Election?"

You also state:

"The City of Springfield, Missouri, proposes to submit a Sales Tax Election to the voters in the near future. I am informed by the City Attorney that in the preparation of the ballot for the City Clerk of the City of Springfield, Missouri, that a question arose concerning an apparent conflict between Sec. 8.120 of the Comprehensive Election Act of 1977 and Section 94.510 RSMo."

Section 94.510 as amended in 1977, provides that the ballot of submission shall contain, but not be limited to, the following language:

☐ For the sales tax

☐ Against the sales tax

The 1977 amendment did not change the language in question.

Honorable William Stoner

Section 8.120 of SSHB No. 101, First Regular Session, 79th General Assembly (which is now numbered Section 115.245, RSMo) provides:

"1. All questions printed on the official ballot shall be phrased in such a manner that the required response is a 'YES' or a 'NO'. Immediately beside or below each question, a 'YES' and a 'NO' shall be printed, immediately followed by a square, the sides of which are not less than one-fourth inch in length. Beneath the question and the 'YES' and 'NO' the following instruction shall be printed: 'If you are in favor of the question, place an X in the box opposite "YES". If you are opposed to the question, place an X in the box opposite "NO".'

"2. When the secretary of state certifies a question to be submitted to a vote of the people, he shall include in his certification the exact wording of the question and the instructions. The wording certified by the secretary of state shall be printed on the official ballot, and no other wording shall be used to submit the question."

Likewise, Section 1.025(22) (now numbered Section 115.013) provides:

"(22) 'Question' means any measure on the ballot which can be voted 'YES' or 'NO';"

Section 8.120 is somewhat similar to the provisions previously contained in Section 111.362 of the Laws of 1973 which section was repealed by the Comprehensive Election Act.

We note that House Bill No. 971, Second Regular Session, 79th General Assembly, which has not as yet been passed, will if enacted specifically repeal and re-enact Section 94.510 to eliminate the present language, above noted, and will if enacted insert in lieu thereof the language:

"The question shall be submitted in substantially the following form:

Shall there be a city sales tax?"

Honorable William Stoner

In our Opinion No. 228, dated November 14, 1977, to McCuskey, this office concluded that the Comprehensive Election Act repealed by implication contrary provisions of Section 247.180, RSMo Supp. 1976, relating to water district elections and Section 190.055, RSMo Supp. 1975, relating to ambulance district elections. That opinion is enclosed and is self-explanatory.

For the reasons stated in that opinion and in light of the legislative history of the provisions you question, we conclude that the provisions of the Comprehensive Election Act govern and the ballot should be worded to conform to the provisions of Section 8.120.

CONCLUSION

It is the opinion of this office that Section 8.120 of the Comprehensive Election Act of 1977 (SSHB No. 101, First Regular Session, 79th General Assembly) provides for the form of the ballot submission with respect to city sales tax elections notwithstanding the provisions of Section 94.510, RSMo, as amended in 1977.

The foregoing opinion, which I hereby approve, was prepared by my assistant, John C. Klaffenbach.

Very truly yours,



JOHN ASHCROFT
Attorney General

Enclosure

Op. No. 228, 11-14-77, McCuskey

Attorney General of Missouri

JOHN ASHCROFT
ATTORNEY GENERAL

JEFFERSON CITY
65101

(314) 751-3321

April 3, 1978

OPINION LETTER NO. 95

Honorable Ralph Uthlaut, Jr.
State Senator, District 23
Senate Post Office
State Capitol Building
Jefferson City, Missouri 65101

Dear Senator Uthlaut:

This letter is in response to your question asking:

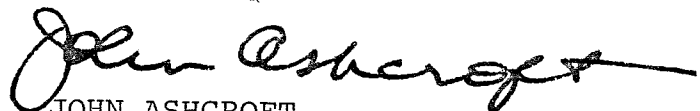
"Can a Missouri citizen mount a petition drive to seek the recall of an elected United States official. If so what procedure would one follow."

There is no procedure provided in the statutes, the Missouri Constitution or the Constitution of the United States for the recall of a United States Senator.

Under the United States Constitution, Article I, Section 5, the United States Senate is the judge of the qualifications of its members. However, we do not pass on whether or not a statutory or Missouri Constitutional provision for recall would violate the United States Constitution.

With respect to recall generally, see 67 C.J.S. Officers §69, p. 297 et seq. and 63 Am.Jur.2nd Public Officers and Employees, §238, p. 770 et seq.

Very truly yours,



JOHN ASHCROFT
Attorney General

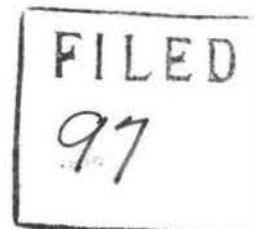
SCHOOLS:
DRIVER'S EDUCATION:

A school district may not grant credit for courses for which a fee is paid to a not-for-profit corporation established to provide courses which the district itself cannot or does not provide.

OPINION NO. 97

June 8, 1978

Honorable J. Anthony Dill
State Representative, District 102
8507 Gravois Road
St. Louis, Missouri 63123



Dear Representative Dill:

This opinion is issued in response to your request for an official ruling on the following question:

"May a public school district by resolution of its board of directors grant graduation credit to students for driver's education or other courses taken by the students through an instructional program made available by a for-profit or not-for-profit corporation when a fee for taking the course is paid by the student to such corporation?"

You have provided the following set of facts connected with your question: the Affton Summer School, Inc., is a not-for-profit corporation organized to establish and conduct, on a nondenominational, nonsegregated, nonpolitical and nonprofit basis, a school for the education of students at the elementary and secondary levels during the summer months when the regular public schools are not in session. The corporation has circulated letters to students at Affton Senior High School advising them that the school district can no longer offer credit for a course for which a fee is charged. Pupils are invited to enroll in a driver's education program offered by the corporation for a fee of \$40. Upon satisfactory completion of the course, the corporation will notify the Affton School District that the student has successfully completed the course and the school district, by resolution adopted by its board of directors, will grant credit toward graduation to the student.

Honorable J. Anthony Dill

You have also indicated that the teachers provided by the corporation will be qualified and certificated public school teachers, that the corporation contemplates providing other summer school courses to students to enable them to make up failed courses or to gain additional credits toward graduation.

None of the members of the board of directors of the school district is a director of the corporation. However, notice to pupils about the corporation's driver's education course offering indicates that the corporation's mailing address is that of Affton Senior High School and their telephone number is that of the Affton School District.

Article IX, Section 1(a) of the Missouri Constitution provides:

"A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the general assembly shall establish and maintain free public schools for the gratuitous instruction of all persons in this state within ages not in excess of twenty-one years as prescribed by law."

In the case of Concerned Parents v. Caruthersville School District, 548 S.W.2d 554 (Mo.Banc 1977), the Missouri Supreme Court held that this constitutional provision "prohibits a school district from charging registration fees or fees for courses for which academic credit is given." 548 S.W.2d at 562.

In the situation you have presented us, the school district itself is not charging a fee for any course. Rather, it is granting credit for a course of instruction which the pupil may secure for a fee from the corporation.

A school district is a creature of statute, and has only such powers as granted by the legislature. Cape Girardeau School Dist. v. Frye, 225 S.W.2d 484 (St.L.Ct. of App. 1949). School districts such as Affton are authorized to establish and maintain summer schools, Section 178.280, RSMo Supp. 1975. That statute provides, however, that tuition may be charged only to those "who are not entitled to receive free public school privileges in that district." If the district were to operate its own summer school pursuant to Section 178.280, it would not be permitted to charge a fee for courses for which academic credit is offered.

The corporation is clearly an entity established with the sanction and cooperation of the school district. By granting credit for the courses offered for a fee by the corporation, the school district is attempting to accomplish indirectly what it may not do directly under the statute or the Constitution, i.e., require payment for a portion of the district's academic instruction. It is a fundamental rule that "what is forbidden to be done in a straight line may not be done in a crooked line. What is forbidden to be done directly may not be done indirectly or obliquely." State ex rel. Wander v. Kimmel, 256 Mo. 611, 165 S.W. 1067, 1072 (1914); see also Harfst v. Hoegen, 349 Mo. 808, 163 S.W.2d 609 (1942).

We recognize that school districts may grant credit for coursework which a pupil has undertaken for a fee at a school other than the public school. For example, a pupil who has attended a parochial school may be granted credit toward graduation for some or all of his coursework upon transfer to a public school. In these situations, the public school district generally exercises its discretion to determine which credits will be transferable in order to ensure that the pupil has met all the requirements of the public school for graduation.

In the instant situation, the public school will be granting credit on a wholesale basis for courses which it cannot afford to offer itself without fee. It is utilizing the corporation to expand (on a fee basis) its own curricular offerings. This practice is contrary to the intent of Article IX, Section 1(a) in that the pupils who are able to pay a fee to take advantage of the corporation's course offerings are afforded educational opportunities of which poor students are deprived. As stated above, the public school, by regularly granting credit for courses provided by the corporation, would be accomplishing indirectly what is forbidden to do directly. We conclude, therefore, that such a practice is prohibited by Article IX, Section 1(a) of the Missouri Constitution and the express holding of Concerned Parents v. Caruthersville School District, supra.

We wish to make clear that this opinion is limited to the factual situation here presented. We do not render any opinion as to the practices of a local school district regarding the transfer of credits for courses obtained by an individual pupil not previously enrolled in a public school. Nor do we suggest that under no circumstances may a pupil be granted credit for a course for which a fee was paid, especially where the course

Honorable J. Anthony Dill

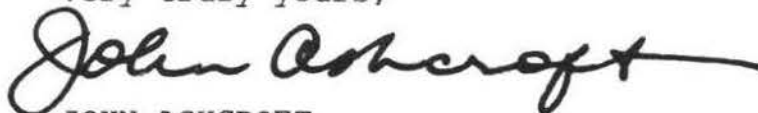
or one similar to it was offered without a fee by the district itself. Our ruling here is therefore limited to the facts you have presented.

CONCLUSION

It is the opinion of this office that a school district may not grant credit for courses for which a fee is paid to a not-for-profit corporation established to provide courses which the district itself cannot or does not provide.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Sheila Hyatt.

Very truly yours,

A handwritten signature in cursive script, reading "John Ashcroft", with a long horizontal flourish extending to the right.

JOHN ASHCROFT
Attorney General

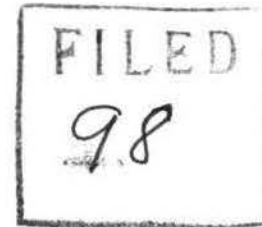
COUNTY SCHOOL BOARDS:
SCHOOLS:

Subsection 3 of Section 162.111,
RSMo, governs with respect to the
costs of an election of the members
of the county board of education.

OPINION NO. 98

April 27, 1978

Honorable C. E. Hamilton, Jr.
Prosecuting Attorney
Callaway County Courthouse
Fulton, Missouri 65251



Dear Mr. Hamilton:

This opinion is in response to your question asking:

"Are the provisions of paragraph 3 of
Section 162.111 RSMo 1969 superseded
by the new comprehensive election law?
If they are, who now pays the costs of
the election for the county school board?"

You also state:

"Callaway County presently has a county
school board. The election for that
school board is held at the April election
each year. In the past the county has fol-
lowed the provisions of paragraph 3 of
Section 162.111 and the school districts
of the county have paid for that election
in the proportion that their assessed val-
uation bears to the assessed valuation of
the entire county. The new comprehensive
election law has now passed and there is
some indication that this new law has super-
seded all other election laws. Therefore,
the Callaway County Clerk needs to know who
will bear the costs of the county school
board election in April of this year."

In Opinion No. 228-1977, this office concluded that the
Comprehensive Election Act repeals by implication contrary provisions
such as Section 247.180, RSMo 1976, relating to water district
elections and Section 190.055, RSMo Supp. 1975, relating to ambulance
district elections. You have a copy of that opinion.

Honorable C. E. Hamilton, Jr.

We believe that the situation is different here. The Comprehensive Election Act of 1977, (Section 2.515 of House Bill No. 101, First Regular Session, 79th General Assembly) Section 115.065, provides:

"1. Except as provided in sections 115.067, 115.069, 115.071, and 115.073, when any question or candidate is submitted to a vote by two or more political subdivisions or special districts at the same election, all costs of the election shall be paid proportionally from the general revenues of all political subdivisions and special districts submitting a question or candidate at the election.

"2. Proportional election costs paid under the provisions of subsection 1 of this section and section 115.067 shall be assessed by charging each political subdivision and special district the same percentage of the total cost of the election as the number of registered voters of the political subdivision or special district on the day of the election is to the total number of registered voters on the day of the election, derived by adding together the number of registered voters in each political subdivision and special district submitting a question or candidate at the election."

Section 162.111, RSMo, referring to elections for county board of education members, provides:

"1. There is created in each second, third and fourth class county in this state a county board of education whose members shall be elected by popular vote at the annual school election held on the first Tuesday in April in each year. Each member shall be a citizen of the United States and of the state of Missouri; a resident householder and voter of the county, and shall be not less than twenty-four years of age. Nominations for board members shall be filed with the secretary of the county board of education at least thirty days before the election. The county board of education shall prepare ballots and publish notice for such election in the same manner as for boards of education in school districts.

Honorable C. E. Hamilton, Jr.

"2. At the annual school election next following October 13, 1963, six members shall be elected whose terms shall be determined at the first meeting of the board subsequent to the election as follows: In each county court district the member receiving the highest number of votes shall serve for three years; the member receiving the next highest number of votes shall serve for two years, and the member receiving the least number of votes shall serve for one year. Thereafter, each member shall serve for three years. Not more than three members shall be elected from one county court district.

"3. The cost of the election shall be charged to each component district of the county in the proportion that its assessed valuation bears to the assessed valuation of the entire county and shall be paid from the incidental fund."

It is our view that an election of county board of education officers conducted under Section 162.111 is not an election within the purview of Section 115.065. A county board of education is not a political subdivision or a special district.

Since the Comprehensive Election Act does not purport to apply to the election costs of county board of education members, there is no repeal by implication or otherwise of subsection 3 of Section 162.111.

We conclude that subsection 3 of Section 162.111, RSMo, governs with respect to the cost of election of such county board members.

In view of our holding that subsection 3 of Section 162.111 governs with respect to the cost of elections of county board of education members it follows that the county clerk in allocating the cost of election when cities and school districts hold elections simultaneously should first determine the total cost of holding the election less the cost of conducting the election for county board of education members and such costs should be allocated between the school districts and the cities under the formula found in Section 115.065, V.A.M.S. (Section 2.515, H.B. No. 101, 79th General Assembly), based on the ratio of registered voters. The cost of the election for county board of education members should then be allocated to each school district on the basis of valuation as provided in subsection 3 of Section 162.111 and the bill for such costs should be added to the amount to be charged to each school district as determined by applying the formula in Section 115.065, V.A.M.S.

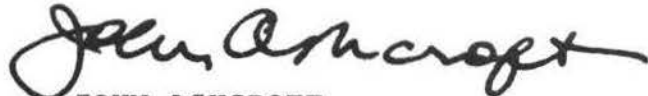
Honorable C. E. Hamilton, Jr.

CONCLUSION

It is the opinion of this office that subsection 3 of Section 162.111, RSMo, governs with respect to the costs of an election of the members of the county board of education.

The foregoing opinion, which I hereby approve, was prepared by my assistant, John C. Klaffenbach.

Very truly yours,

A handwritten signature in black ink, appearing to read "John Ashcroft", written in a cursive style.

JOHN ASHCROFT
Attorney General

ELECTIONS:

SCHOOL ELECTIONS:

Subsection 3 of Section 115.517 of the Comprehensive Election Act of 1977, which requires a special election in case of a tie vote, is applicable to annual school elections at which directors are elected.

OPINION NO. 99

April 13, 1978

Dr. Arthur Mallory
Commissioner, Department of
Elementary and Secondary Education
6th Floor, Jefferson Building
Jefferson City, Missouri 65101



Dear Dr. Mallory:

This opinion is in response to your question asking:

"At the annual school election at which two directors are to be elected, how should the matter be resolved if one person is clearly elected but two candidates receiving the next highest number of votes receive an equal number of votes?

"Previous to the enactment of the Comprehensive Election Act of 1977, this office answered inquiries following each annual election by referring to the opinion from your office issued to Sturgis dated 5/31/55, but Section 115.517(3) appears to invalidate that opinion."

Subsection 3 of Section 115.517 of the Comprehensive Election Act of 1977, provides:

"If two or more persons receive an equal number of votes for nomination or election to any office not otherwise provided for in section 115.515 or this section, and a higher number of votes than any other candidate for nomination or election to the same office, the officer with whom such candidates filed their declarations of candidacy shall, immediately after the results of the election have been certified, issue a proclamation stating the fact and ordering a

Dr. Arthur Mallory

special election to determine which candidate is elected to the office. The proclamation shall set the date of the election and shall be sent by the officer to each election authority responsible for conducting the special election. In his proclamation, the officer shall specify the name of each candidate for the office to be voted on at the election, and the special election shall be conducted and the votes counted as in other elections."

In our Opinion No. 228-1977, this office concluded that the Comprehensive Election Act repealed by implication contrary provisions of Section 247.180, RSMo Supp. 1976, relating to water district elections and Section 190.055, RSMo Supp. 1975, relating to ambulance district elections. A copy of that opinion is enclosed.

We believe that the reasoning in that opinion is applicable to the question you present. Therefore, inasmuch as school elections come within the provisions of the Comprehensive Election Act, it is our view that subsection 3, quoted above, is applicable to such elections. Therefore, a tie vote would require a special election.

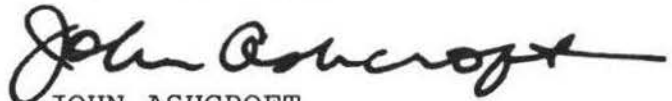
Our previous Opinion No. 86, dated May 31, 1955 to Sturgis, was prior to the enactment of the Comprehensive Election Act and is therefore withdrawn.

CONCLUSION

It is the opinion of this office that subsection 3 of Section 115.517 of the Comprehensive Election Act of 1977, which requires a special election in case of a tie vote, is applicable to annual school elections at which directors are elected.

The foregoing opinion, which I hereby approve, was prepared by my assistant, John C. Klaffenbach.

Very truly yours,



JOHN ASHCROFT
Attorney General

Enclosure
Op. No. 228-1977

Attorney General of Missouri

JOHN ASHCROFT
ATTORNEY GENERAL

JEFFERSON CITY

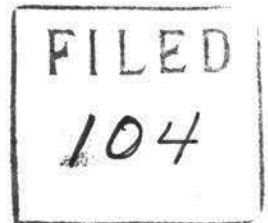
65101

(314) 751-3321

September 27, 1978

OPINION LETTER NO. 104
Answer by Letter - Wood

Honorable Marion Cairns
State Representative, 96th District
17 East Swon Avenue
Webster Groves, Missouri 63119



Dear Representative Cairns:

This is in reponse to your request for an opinion as to the authority of the Division of Health to set different requirements for renewing the licenses of mobile emergency medical technicians, attendants, and attendant-drivers under the provisions of Sections 190.100 to 190.195, RSMo 1975 Supp. Specifically, you ask:

"Does the state Division of Health have the authority to raise or lower the requirements for relicensing of Emergency Medical personnel so that those requirements would not conform to the standards or requirements in effect when those personnel first became licensed in Missouri (i.e. Could more or fewer hours of training be required for relicensing than were required for original licensing)?"

Section 190.145, RSMo 1975 Supp., sets forth the qualifications for licensing as an attendant, attendant-driver, or mobile emergency medical technician. Said section reads as follows:

"1. The license officer shall, within a reasonable time after receipt of an application, cause such investigation as he deems necessary to be made of the applicant for an attendant's or attendant-driver's license.

2. The license officer shall issue a license to an attendant or attendant-driver, valid for a period of

three years, unless earlier suspended, revoked or terminated, when he finds that the applicant:

- (1) Is eighteen years of age or older;
- (2) Is not addicted to the use of intoxicating liquors or narcotics, and is morally fit for the position;
- (3) Is able to speak, read and write the English language;
- (4) Has been found by a duly licensed physician, upon examination attested to on a form provided by the health officer, to be of sound physique, possessing visual acuity conforming to that required for a chauffeur's license, and free of physical defects or diseases which might impair the ability to drive or attend an ambulance;
- (5) For each applicant for attendant or attendant-driver's license, that such applicant has a currently valid certificate evidencing successful completion of a course of training equivalent to the advanced course in first aid given by the American Red Cross or the United States Bureau of Mines, or incorporating the curriculum of the basic training for ambulance personnel recommended by the United States Department of Transportation. No one shall be licensed as an attendant-driver unless he holds a currently valid operator's or chauffeur's license from the state of Missouri; and
- (6) For each applicant for a mobile emergency medical technician's license, that such applicant meets the requirements for attendant, subsection 2 above, and in addition has successfully completed an emergency service training program consisting of a minimum of two hundred hours of training including, but not limited to, didactic and clinical experience in a cardiac care unit and in an emergency vehicle unit.

3. A license as attendant mobile emergency medical technician or attendant-driver is not assignable or transferable.

4. No official entry made upon a license may be defaced, removed or obliterated."

Section 190.160, RSMo 1975 Supp., provides that: "The renewal of any license shall require conformance with all of the requirements . . . [of the law] . . . as upon original licensing."

Standing alone, there is nothing in either of these sections which would authorize the Division of Health to require additional training or education of any licensees for purposes of renewing licenses. However, we think it is clear that any applicant for renewal of license as an attendant, attendant-driver or mobile

emergency medical technician cannot rely on any training which is not currently valid. Section 190.145.2(5) specifically requires each applicant for attendant or attendant-driver's license to demonstrate a currently valid certificate regarding training. Likewise, the definition of "mobile emergency medical technician", as that term is defined in Section 190.100(11), RSMo 1975 Supp., requires each applicant to have successfully completed an emergency service training program certified by the Director of the Division of Health as meeting the requirements of Sections 190.100 to 190.195. When coupled with the broad regulatory power given to the Division of Health to promote safe and adequate ambulance services in the interest of public health, safety and welfare, as set forth in Section 190.185, RSMo 1975 Supp., it seems reasonable that the Division of Health would have broad rulemaking powers when determining whether or not the educational background and training of a licensed applicant for renewal is currently valid or certified as meeting the requirements of Sections 190.100 to 190.195. Inasmuch as the condition of previous licensing is a fact of no significance under the terms of Section 190.160, the Division of Health has the authority to require every applicant to demonstrate the successful completion of an emergency service training program which is currently valid under the Division's rules. To allow an applicant for renewal of license to rely upon emergency medical training which may be outdated and no longer reflective of the current state of the art would run counter to the very purpose of the law.

Therefore, to the extent that the Division of Health by rule promulgates new or different training or education requirements during the course of any licensee's present license, such a licensee must demonstrate a successful completion of such new requirements as a condition of eligibility to the issuance of a renewal license.

Very truly yours,

JOHN ASHCROFT
Attorney General

Attorney General of Missouri

JOHN ASHCROFT
ATTORNEY GENERAL

JEFFERSON CITY

65101

(314) 751-3321

October 12, 1978

OPINION LETTER NO. 105

Honorable Ronald L. Boggs
Prosecuting Attorney
St. Charles County
200 North Second Street
St. Charles, Missouri 63301

Dear Mr. Boggs:

This is in response to your request for a legal opinion on the following question:

"Is a sanitarian employed by the County of St. Charles, a second class county, an agent of the State Director of Health and capable of making restaurant inspections within the County of St. Charles as such agent, his salary being partially reimbursed by state funds?"

We understand your question to demand an interpretation of the following statute which in material part states:

"The director of the division of health and his assistants or agents by him appointed, the state, county, city and town health officers shall have full power at any time to enter and inspect every building, room, basement or cellar, occupied or used, . . . for sale . . . of food . . ." §196.230, RSMo.

Honorable Ronald L. Boggs

The Missouri Division of Health has for a great number of years entered into annual financial aid agreements with local health departments throughout the state. The Division uses federal and state funds appropriated to it for these purposes to reimburse the local department for a varying percentage of their personnel costs. One of the conditions of this financial assistance is as follows:

"That the Local Health Unit shall accept responsibility for the discharge of State Public Health Programs as assigned to the Local Unit in keeping with the adequacy of their personnel and in conformity with the procedural manual of the Division of Health."

Through these agreements the Division of Health in effect pays for part time services of local health department employees for the undertaking of certain state public health programs.

However we do not believe that county health department personnel whose ultimate salary is partially borne by the state in this manner and who pursuant to the state-county agreement enforce and otherwise carry out certain state health laws and regulations are thereby, and without more, agents of the state director of health for purposes of \$196.230, RSMo.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John Ashcroft", with a long, sweeping horizontal line extending to the right.

JOHN ASHCROFT
Attorney General



Attorney General of Missouri

JOHN ASHCROFT
ATTORNEY GENERAL

JEFFERSON CITY

65101

(314) 751-3321

June 22, 1978

OPINION LETTER NO. 106

C. Duane Hensley, Ph.D.
Director
Department of Mental Health
2002 Missouri Boulevard
Jefferson City, Missouri 65101

Dear Dr. Hensley:

This letter is in response to your request for an opinion on the following question:

"Are expenses for babysitting, loss of wages to council members or costs of paying for job coverage while doing council business reimbursable under Section 202.022 RSMo?"

You have stated that you are asking this question because it involves the exercise of administrative duties required to be done by you. Section 202.022.5, RSMo Supp. 1975, relates to the Missouri Advisory Council on Alcoholism and Drug Abuse and reads as follows:

"Each member shall be reimbursed for necessary expenses actually incurred in the performance of his official duties."

It is our opinion that baby-sitting expenses, loss of wages, and costs of paying for job coverage incurred while performing Council duties are personal expenses and thus not reimbursable.

Very truly yours,

A handwritten signature in dark ink, reading "John Ashcroft", is written over the typed name.

JOHN ASHCROFT
Attorney General



Attorney General of Missouri

JEFFERSON CITY

(314) 751-3321

JOHN ASHCROFT
ATTORNEY GENERAL

65101

June 2, 1978

OPINION LETTER NO. 107

Honorable Mark T. Kempton
Prosecuting Attorney
Pettis County Courthouse
Sedalia, Missouri 65301



Dear Mr. Kempton:

This letter is in response to your question asking:

"When an action pursuant to Section 195.145 RSMo. is determined in favor of the Respondent and the costs of storage are taxed against the State of Missouri, who is liable for the costs incurred during the pendency of the action for storage of the automobile which is the subject of the action?"

You further state:

"On February 24, 1977, an automobile was seized by two Sedalia Police Officers, John Fillicetti and Ronald Hoskins, in Pettis County, Missouri, pursuant to Chapter 195.145 of the Revised Statutes of the State of Missouri. At the time of the seizure of the vehicle, the owner of said vehicle was arrested for the offense of sale of a controlled substance which was alleged to have taken place in the automobile seized.

"On March 9, 1977, a Petition was filed in the Circuit Court of Pettis County, Missouri, styled State of Missouri ex rel John Fillicetti & Ronald Hoskins, Relators, vs. George Wolf, Respondent, seeking to declare the automobile seized a common nuisance and for an order of its sale. Thereafter, on April 29, 1977, a trial was had to the Court and the Court ordered the vehicle returned to the respondent. The Court further ordered the costs of storage taxed against the State of Missouri. These proceedings were had in Case No. 33631 in the Circuit Court of Pettis County, Missouri.

"From the time of its seizure until the Order for the vehicle's return entered on April 29, 1977, the vehicle was stored by Broadway Texaco of 2602 West Broadway, Sedalia, Missouri 65301. Broadway Texaco thereafter tendered a bill to the Pettis County Clerk and the Prosecuting Attorney of Pettis County, Missouri, for the costs of towing and storage of the vehicle seized by the police officers on February 24, 1977, which was the basis of the action noted herein. The bill recited a towing charge of \$25.00 and storage for 65 days at the rate of \$10.00 per day, for a total of \$675.00."

First of all, we would like to point out that there seems to be good reason to question the reasonableness of the rate charged for the storage. Clearly, even if the property had been subject to forfeiture and sale, only reasonable costs of storage could have been paid.

The basic rule with respect to court costs is that such costs can be recovered only where expressly authorized by statute and that all statutes relating to cost should be strictly construed. In re Green, 40 Mo.App. 491 (1890). The docket entries which you have furnished us do not indicate any taxation of court costs. In any event, such costs could not be taxed against the state. See our Opinion No. 70, dated February 1, 1954, to Peters, copy enclosed.

As you have noted, subsection 7 of Section 195.145, RSMo, expressly provides that under no circumstances shall the officer commencing the action on behalf of the state be liable for any

Honorable Mark T. Kempton

costs or storage. You have indicated that you believe that Section 514.210, RSMo, should be read in conjunction with Section 195.145.7. However, it is our view that Section 514.210, RSMo, is not applicable. Further, there is nothing in Section 195.145 or elsewhere which would impose the costs of storage on the "local enforcement agency for which the officer is acting" as you suggest. We do not determine whether the city is liable for the costs of storage under any other theory. While we find no cases to guide us in an interpretation of Section 195.145 or the similar section with respect to the liquor laws, Section 311.840, RSMo, it is our view that neither the officers involved nor the city would be responsible for the towing charges incurred under the provisions of Section 195.145.

You indicate that there was no "judgment" of the court other than as shown in the court's docket entries. Of course, such a docket entry is not a "judgment" from which an appeal may be taken notwithstanding its cognomination as a "judgment". Gray v. Bryant, 557 S.W.2d 489 (Mo.Ct.App. at Spr. 1977). A docket entry dated May 29, 1977, indicates that the court ordered the costs of storage taxed against the State of Missouri.

We know of no authority for the taxation of such costs against the State of Missouri and know of no authority for the payment of such costs out of any fund by the State of Missouri or by the county. The only authority for the payment of costs of storage, which necessarily would have to be reasonable would be under subsection 4 of Section 195.145 upon a finding that the property was to be sold. Since such was not the case in this instance, we know of no authority for the payment of such costs of storage.

If such property had been sold, the proceeds of the sale would be required to be paid into the county school fund. See our Opinion No. 192-1974, enclosed. It appears clear that, as we have indicated, even where a forfeiture is ordered the proceeds should not be subjected to unreasonable depletion. The situation presented here suggests that such cases in the future should be handled so as to minimize deductions and to preserve the county school fund.

We conclude that, notwithstanding the order of the court entered in the case as recited to us, there is no fund from which the county or the State of Missouri can legally pay such storage charges.

Very truly yours,



JOHN ASHCROFT
Attorney General

Enclosure: Op. No. 192-1974
Op. No. 70-1954

Attorney General of Missouri

JOHN ASHCROFT
ATTORNEY GENERAL

JEFFERSON CITY
65101

(314) 751-3321

April 28, 1978

OPINION LETTER NO. 103

Dr. Arthur L. Mallory
Commissioner of Education
Department of Elementary and
Secondary Education
Jefferson State Office Building
Jefferson City, Missouri 65101

Dear Dr. Mallory:

This letter is in response to your request for our review and certification of the Department of Elementary and Secondary Education's Annual Program Plan for Adult Education Programs under the Adult Education Act of 1970, as amended.

Our review has taken into consideration the Adult Education Act of 1970, 20 U.S.C. 1201 et seq., as amended; the federal regulations applicable to such act, (45 C.F.R. parts 100, 166, 167); Article III, Section 38(a), Article IV, Section 15, and Article IX, Sections 1(b), 2(a) and 2(b), Missouri Constitution; Sections 161.092, 171.096 and 178.430, RSMo 1969; and Section 171.091, RSMo Supp. 1975, and related provisions.

It is the opinion of this office that:

1. The Missouri State Department of Elementary and Secondary Education is the state agency primarily responsible for the state supervision of public elementary and secondary schools and is, therefore, the "State education agency" as that term is defined in 20 U.S.C. Section 1202(h).

Dr. Arthur L. Mallory

2. The Department of Elementary and Secondary Education has the authority under state law to submit this Annual Program Plan.
3. The State Treasurer has authority under state law to receive, hold and disburse federal funds under the Annual Program Plan.
4. All of the provisions of the foregoing plan are consistent with state law.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John Ashcroft", with a stylized, flowing script.

JOHN ASHCROFT
Attorney General

Attorney General of Missouri

JOHN ASHCROFT
ATTORNEY GENERAL

JEFFERSON CITY

(314) 751-3321

65101

June 22, 1978

OPINION LETTER NO. 109

Dr. Arthur L. Mallory, Commissioner
Department of Elementary and Secondary
Education
Jefferson State Office Building
Jefferson City, Missouri 65102

Dear Dr. Mallory:

In accordance with your request of April 17, 1978, we have reviewed the Missouri State Department of Elementary and Secondary Education's "Title I, ESEA, Annual Program Plan, Fiscal Year Ending September 30, 1979." This application for federal funds is being submitted under Title I of the Elementary and Secondary Education Act of 1965, P.L. 89-10, as amended.

In addition to the Elementary and Secondary Education Act of 1965, as amended, and the regulations propounded pursuant thereto (45 C.F.R. Parts 116 and 116a), our review has taken into consideration Article III, Section 38(a), Missouri Constitution, and Section 161.092, RSMo Supp. 1975.

Based on the foregoing, we hereby certify that the Missouri State Department of Elementary and Secondary Education has authority under state law to perform the duties and functions of a state educational agency under Title I of the Elementary and Secondary Education Act of 1965, as amended, and the regulations propounded pursuant thereto, including those arising from the assurances set forth in the application.

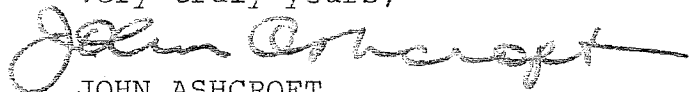
We understand that questions have been raised concerning the effect of the Missouri Supreme Court's decision in Mallory v. Barrera, 544 S.W.2d 556 (Mo. banc 1976), on the ability of Missouri's state educational agency to enforce the comparability

Dr. Arthur L. Mallory

requirements of Title I and its implementing regulations. We do not believe this certification letter should address that issue since it involves the administrative interpretation of federal regulations, but raise it for consideration by the United States Office of Education.

In addition to this opinion letter which constitutes our official certification, we have executed the form of certification attached to the Annual Program Plan.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John Ashcroft", with a long, sweeping horizontal stroke extending to the right.

JOHN ASHCROFT
Attorney General



JOHN ASHCROFT
ATTORNEY GENERAL

Attorney General of Missouri

JEFFERSON CITY

65101

(314) 751-3321

September 26, 1978

OPINION LETTER NO. 110

Honorable Glenn Binger
State Representative, District 41
R.R. 3, Box 352
Independence, Missouri 64057

Dear Representative Binger:

This is in response to your request for an official opinion of this office asking whether the State Board of Education has authority to make distinctions between the allowable costs it will reimburse for the two types of pupil transportation services - school district operated transportation, and contracted transportation.

Section 163.161, House Bill No. 969, 79th General Assembly, grants the State Board of Education broad authority to determine allowable costs for state aid. This statute provides in pertinent part:

" . . . Any school district which makes provision for transporting pupils as provided in sections 167.231 and 167.241, RSMo, shall receive state aid for the ensuing year for such transportation on the basis of the cost of pupil transportation services provided the current year. A district shall receive an amount not greater than eighty percent of the allowable costs of providing pupil transportation services to and from school, except that in no case shall a district receive an amount per pupil greater than one hundred twenty-five percent of the state average approved cost per pupil transported the second preceding school year. The state board of education shall approve all bus routes and determine the total

Honorable Glenn Binger

miles each district should have for effective and economical transportation of the pupils and shall determine allowable costs."
(Emphasis added).

Pursuant to the above statute, the State Board of Education defined allowable costs for state transportation in Rule 5 CSR 40-261.040. This rule provides in pertinent part:

"(1) Allowable Costs for School District Operated Transportation

(A) Salaries of bus drivers and other personnel except administrative staff employed for the operation and maintenance of pupil transportation will be allowable. If employees have other school duties besides those relating directly to transportation, their salaries shall be divided between pupil transportation and other programs according to time actually spent in each program.

* * *

"(2) Allowable Costs for Contracted Transportation Service

(A) Contracted transportation costs, including transportation of four (4) students or less under the provisions of section 304.060 RSMo and costs paid to other school districts, are allowable.

(B) Not more than one (1) percent of total contracted transportation cost may be charged for district administrative expense connected with the transportation program as specified under section (1)(A)3 of this rule."

You have provided us with the example of a safety engineer to illustrate the distinction made between contracted and district-operated transportation services. If the district contracts for transportation services, the entire salary of a safety engineer hired by the contractor might be included in the cost of the contract and would therefore be an allowable cost. However, if the school district hires its own safety engineer and transports students in district-owned buses, the engineer is considered to be a member of the administrative staff under Section (1)(A)3 of the above rule. This section provides:

Honorable Glenn Binger

"3. Administrative staff including directors of transportation, bus supervisors, superintendents of schools, assistant superintendents, school principals, business managers, payroll clerks, secretaries, or personnel directors who may devote all or a portion of their time to pupil transportation may be charged in an amount not exceeding five (5) percent of the total of other salaries charged to the program under sections (1)(A), (1)(A)1, and (1)(A)2 of this rule."

Thus, the entire salary of a safety engineer hired by the district might not be allowable.

An administrative regulation is invalid if it violates the statute under which it is issued or if it is beyond the scope of statutory authority. As stated in 2 Am.Jur.2d Administrative Law § 300 (1962) p. 126:

"Administrative rules and regulations, to be valid, must be within the authority conferred upon the administrative agency. A rule or regulation which is broader than the statute empowering the making of rules, or which oversteps the boundaries of interpretation of a statute by extending or restricting the statute contrary to its meaning, cannot be sustained. To the extent that a regulation is not in conformity with the statute and with controlling judicial interpretations of the statute it conflicts with the meaning of such statute and so is unauthorized; and regulations must conform, not only with the statute under which they are issued, but also with the constitution and other laws."

Because the grant of authority in this instance is so broad, and virtually no legislative direction delimits the discretion of the state board in making its determinations of allowable costs, we cannot conclude that the regulations in question go beyond the scope of statutory authority, or are in conflict therewith.

A regulation must not only be promulgated pursuant to the authority granted, but it must also be a reasonable application of the legislative intent. In 2 Am.Jur.2d Administrative Law § 303 (1962) p. 131, it is provided that:

Honorable Glenn Binger

"Administrative agencies may not act arbitrarily and capriciously in the enactment of rules and regulations in the exercise of their delegated powers. Whether so required by statute expressly or impliedly or by judicial decision, or as a necessary element of due process of law or a restriction upon exercise of the police power, an administrative regulation must be reasonable in order to be valid. Regulations which are arbitrary or unreasonable will not be sustained or enforced but will be set aside by the courts.

"Rules and regulations of administrative agencies must be reasonably directed to the accomplishment of the purposes of the statute under which they are made, tend to its enforcement, or be reasonably adapted to secure the end in view. They are invalid if shown to bear no reasonable relation to the purposes for which they are authorized to be made."

A board of education, such as the state board here, is given considerable latitude by the courts in issuing rules and regulations. Except for providing redress for unreasonable, arbitrary, capricious or unlawful action by a board of education in their exercise of broad power and discretion to manage school affairs which are statutorily granted to such officials, courts will not interfere in the management of school affairs. School Dist. of Kansas City v. Clymer, 554 S.W.2d 483 (K.C.App. 1977); Aubuchon v. Gasconade County R-I School Dist., 541 S.W.2d 322 (St.L.App. 1976); see also 68 Am.Jur.2d Schools § 55 (1962) p. 406, where it is stated:

". . . The presumption is always in favor of the reasonableness and propriety of a rule or regulation duly made, and one attacking such rule or regulation has the burden of persuasion to prove otherwise."

Applying the above principles to the situation presented here, it is our opinion that presumption of reasonableness should prevail. While the rule set forth in 5 CSR 40-261.040 et seq., does make a distinction between district-operated and contracted transportation services in connection with reimbursement for administrative salaries, we cannot conclude that such distinctions are per se invalid. Obviously, the two types of service are in fact different and any rule dealing with the costs thereof must take account of such differences.

Honorable Glenn Binger

We can presume that the legislature would not intend that a school district be given any financial advantage by virtue of its choice between district-operated and contracted transportation services. However, we cannot say, purely on the basis of the example you have provided that such is the net result of the state board's rule. In order to determine whether the allowable cost regulations do create an unreasonable financial distinction, it would be necessary to compare the total state reimbursement for similar districts operating the two different systems on the basis of average cost per child, or a similar method of comparison. Although the rule appears to "favor" contracted transportation in connection with administrative salaries, there may be other areas in which district-owned transportation is similarly "favored". The net effect of the regulatory scheme may be neutral, and without some evidence that it operates to promote one form of transportation substantially over the other, we cannot conclude that the rules are unreasonable.

It is our view that the State Board of Education has authority to make distinctions between district-operated and contracted pupil transportation services in the exercise of its discretion to determine allowable costs.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John Ashcroft", with a long horizontal flourish extending to the right.

JOHN ASHCROFT
Attorney General

April 28, 1978

OPINION LETTER NO. 111
Answer by Letter - Klaffenbach

Honorable Milt Harper
Prosecuting Attorney
Boone County Courthouse
Columbia, Missouri 65201



Dear Mr. Harper:

This letter is in response to your question asking whether the county court or the county clerk has the legal authority to place on a primary election ballot a proposition asking whether the voters by a "yes" or "no" vote approve construction of the Meramec Dam and Lake.

The proposition voted on would be merely advisory. Such a proposition is not within the legal scope of initiative or referendum.

We note that Senate Bill No. 727, Second Regular Session, 79th General Assembly, which has been signed by the Governor and is now law, requires that the Governor call a preference election in which the voters in certain counties will express their views as to whether the Meramec Dam and Meramec Park Lake should be constructed. However, Boone County is not included in the provisions of that law.

Clearly the county court is invested with only such powers with reference to the management of the affairs of the property and business of the county as are expressly conferred on it by statute and such as may be fairly implied from those expressly granted. Walker v. Linn County, 72 Mo. 650 (Mo. 1880). We know of no law authorizing the county court or county clerk to put such a proposition on the ballot and no such authority can be implied.

Very truly yours,

JOHN ASHCROFT
Attorney General

Attorney General of Missouri

JOHN ASHCROFT
ATTORNEY GENERAL

JEFFERSON CITY

(314) 751-3321

65101

May 9, 1978

OPINION LETTER NO. 114

Honorable Carl H. Muckler
State Representative, District 56
1820 Arundel Drive
Florissant, Missouri 63033

Dear Representative Muckler:

We are enclosing Opinion No. 365, rendered September 9, 1963, to Representative Frank L. Mickelson, which together with the enclosure to such opinion answers the question contained in your recent opinion request.

We are also enclosing Opinion No. 98, rendered April 27, 1978, to C. E. Hamilton, Jr., to which you refer in your opinion request. You will note that such opinion does not hold that school districts are not political subdivisions but it holds only that the county school board is not a political subdivision or a special district.

Very truly yours,



JOHN ASHCROFT
Attorney General

Enclosures



Attorney General of Missouri

JEFFERSON CITY

JOHN ASHCROFT
ATTORNEY GENERAL

65101

(314) 751-3321

June 23, 1978

OPINION LETTER NO. 116

Honorable Robert L. Cox
Prosecuting Attorney, Henry County
P. O. Box 220
Clinton, Missouri 64735

Dear Mr. Cox:

This letter is in response to your question asking:

"If a county has adopted a township organization form of government as provided by Chapter 65 of the Revised Statutes of Missouri, which designates such townships to be corporate bodies (65.260 RSMo.), is such county precluded from creating a county zoning program under Section 64.845, and from prescribing zoning regulations under Section 64.850, due to the provision in the latter section, stating that such zoning regulations would apply to the 'welfare of the unincorporated portion'."

You also state:

"Henry County, Missouri, is currently under a township form of government as provided in Chapter 65 of the Revised Statutes of Missouri. There has been a question raised for the County Court in reference to placing on the ballot the vote to create a county zoning program as pro-

Honorable Robert L. Cox

vided by Section 64.845 RSMo. This section and others provide that the County Court may, upon petition, place such option on the ballot. However, the question has arisen as to whether this can be done in a county where township form of government, under Chapter 65, as incorporated areas, would be subject to said zoning laws."

Section 64.850, RSMo Supp. 1975, which you cite, provides:

"For the purpose of promoting health, safety, morals, comfort or the general welfare of the unincorporated portion of counties of the first class not having a charter form of government, or of counties of the second, third or fourth class to conserve and protect property and building values, to secure the most economical use of the land, and to facilitate the adequate provision of public improvements all in accordance with a comprehensive plan, the county court of any county of the first class not having a charter form of government, or of any county of the second, third or fourth class may, after approval by vote of the people as provided in section 64.845, regulate and restrict, by order of record, in the unincorporated portions of the county, the height, number of stories, and size of buildings, the percentage of lots that may be occupied, the size of yards, courts and other open spaces, the density of population, the location and use of buildings, structures and land for trade, industry, residence or other purposes."

The above section was first enacted in 1965. At the same time the legislature enacted the companion sections, Sections 64.800, et seq., RSMo. Comparison with Section 64.800, RSMo Supp. 1975, reveals that Section 64.800 specifically excludes the areas of the county outside "the corporate limits of any city, town or village which has adopted a city plan in accordance with the laws of this state."

Section 64.825, RSMo, provides that the county planning commission may also prepare, with the approval of the county court, as parts of the official master plan or otherwise, sets of regulations governing subdivisions of land in unincorporated areas. This reference was undoubtedly to areas not in incorporated cities, towns and villages.

Honorable Robert L. Cox

Likewise Section 64.830 provides for the approval of plats of land lying within one and one-half miles of the limits of the "incorporated area of the municipality" only by unanimous vote of the county court when a city council or town or village board by resolution protests the action of the county planning commission approving such plat. The meaning here is reasonably clear.

Section 64.835 refers to setback lines on major highways and refers to such highways "outside the corporate limits of municipalities".

Finally, in the same context, Section 64.850, which we have quoted above, refers only to the unincorporated portion of counties of the first class not having a charter form of government, or of counties of the second, third or fourth class. It also expressly states that the county court of any such county may, after approval by vote of the people as provided in Section 64.845, RSMo Supp. 1975, regulate as provided therein "in the unincorporated portions of the county," the height, number of stories and size of buildings and other matters as provided therein.

Thus, it seems apparent that the scheme of these laws with respect to the interpretation of "unincorporated areas" means those areas not within incorporated municipalities. There is no reference to township organization counties and although such bodies are corporate bodies under Chapter 65, RSMo, we feel certain that it was not the legislative intent to exclude township organization counties from the provisions of 64.850 or to treat such counties differently from such other counties. If such had been the legislative intent, it could have been clearly evidenced in enacting Section 64.850.

We do not believe that any of the precise powers given to the township corporate body board of directors under Sections 65.260, et seq., RSMo, conflict with the powers granted the county court under Section 64.850 when approved by the vote of the people as provided in 64.845. We note that we previously concluded, in Opinion No. 185, dated July 7, 1966, to Simonds, copy enclosed, that a township in a township organization county does not have authority to enact a township plan or zone independently from the rest of the county. By comparison, it is clear that a township organization county can have county planning under Section 64.800 if approved by the voters.

Finally, Section 64.885, RSMo Supp. 1975, provides that the county court in any county of the first class not having a charter form of government or of any county of the second, third and fourth class may, with voter approval, adopt county planning

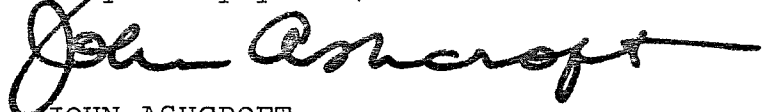
Honorable Robert L. Cox

and zoning and provides specifically that in all such counties adopting county planning and zoning the provisions of Sections 64.800 to 64.840 and Sections 64.845 to 64.880 shall be applicable. It is clear that when such approval is given by the voters under Section 64.885, county planning is applicable to the areas of the county outside the corporate limits of cities, towns and villages which have adopted plans and the approval by the voters of county planning and zoning obviously authorizes county zoning in areas of the county outside the limits of cities, towns and villages because of the provisions of Section 64.885 that the provisions of Sections 64.845 to 64.880 shall be in effect in such county.

Since county planning and zoning can be authorized by a township organization county by vote of the people under Section 64.885, we are of the view that county planning can be authorized by a vote of the people in township organization counties under provisions of Section 64.845. The legislative intent is clear that the reference to the "unincorporated portions" of a county in Section 64.850 refers to those areas of the county outside the limits of cities, towns and villages in both township organization counties and other counties.

Therefore, we conclude that Section 64.850 is applicable to township organization counties.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John Ashcroft", with a long horizontal flourish extending to the right.

JOHN ASHCROFT
Attorney General

Enclosure:

Op. No. 185, 7-7-66, Simonds

Attorney General of Missouri

JOHN ASHCROFT
ATTORNEY GENERAL

JEFFERSON CITY
65101

(314) 751-3321

May 23, 1978

OPINION LETTER NO. 117

Honorable James F. McHenry
Prosecuting Attorney
Cole County Courthouse, Room 400
Jefferson City, Missouri 65101

Dear Mr. McHenry:

This letter is in response to your question asking:

"Which of two (2) candidates for the same county office and of the same political party should be placed first on the ballot: the candidate who files the declaration of his candidacy first but who does not obtain, file or exhibit a receipt from the Treasurer of the County central committee of the political party upon whose ticket he seeks nomination (as required by Section 120.350 RSMo 1969[sic]) until after a second candidate for the same county office and of the same political party has filed both his declaration of candidacy and the receipt from the Treasurer of the County central committee or the said second candidate?"

You also state:

"On August 31, 1977, at 9:15 a.m., Howard L. McFadden filed his declaration of candidacy for Democratic nomination for Prosecuting Attorney of Cole County. At the time that this declaration of candidacy was filed, no receipt from the Treasurer of the County

Democratic Committee was presented, exhibited or filed. No presentation was made by McFadden that he had previously obtained such a receipt.

"At 9:35 a.m., on August 31, 1977, Thomas J. Brown III filed his declaration of candidacy for the Democratic nomination for Prosecuting Attorney of Cole County. At the same time, Brown filed a receipt from the Treasurer of the County Democratic Committee indicating that he had paid Twenty-five dollars (\$25.00) to the said treasurer as required by Section 120.350 RSMo 1935 [sic].

"Later, on the afternoon of August 31, 1977, McFadden returned to the County Clerk's office and filed a receipt which had been obtained that day from the Treasurer of the County Democratic Committee."

You have referred to Section 120.350, RSMo. Such section has been repealed by the Comprehensive Election Act of 1977 (H.B. No. 101, 79th General Assembly, Chapter 115, V.A.M.S.) Section 115.357, V.A.M.S. contains similar provisions, however, and provides that such a candidate, before filing his declaration of candidacy, must pay to the treasurer of the county committee of the political party upon whose ticket he seeks nomination the sum of \$25.00 or must pay to the officer accepting his declaration of candidacy such amount.

Subsection 5 of Section 115.357 also provides that, except as otherwise provided in such subsection, no candidate's name shall be printed on any official ballot unless the required fee has been paid.

Section 115.395, V.A.M.S., provides that such candidates, at the primary election, shall have their names appear for such office in the order in which they are filed.

We enclose our Opinions No. 37, dated June 4, 1954 to Hamilton; No. 100, dated February 13, 1964, to Schellhorn; and No. 99, dated May 12, 1944, to Woodward. Such opinions are self-explanatory. We also refer you to State ex rel. Dodd et al. v. Dye, 163 S.W.2d 1055 (Spr.Ct.App. 1942), and State ex rel. Haller v. Arnold, 210 S.W. 374 (Mo.Banc 1919).

We note also that the repealed section, Section 120.350, provided that the candidate shall take a receipt for the fee

and file the receipt with his declaration of candidacy. On the other hand, subsection 2 of Section 115.357 provides that: "The required sum may be submitted by the candidate to the official accepting his declaration of candidacy", but does not require the filing of a receipt. Further, we are unable to locate any provision in the new election law which requires the filing of a receipt in such a case. The legal reasoning previously employed by the courts with respect to filing receipts would however, in our view, be applicable to the present provisions.

Under the holdings of the above opinions we believe that the requirement of subsection 1 of Section 115.357 that the candidate pay the treasurer of the county committee the required amount before filing his declaration of candidacy is directory and not mandatory in the sense that the payment of the fee, as in this instance, directly after filing such declaration would not, in our view, invalidate the filing or change the time of the filing. It was said in Elliott v. Hogan, 315 S.W.2d 840 (St.L.Ct.App. 1958) that strictly speaking all laws are mandatory in the sense that they are enacted to be observed and obeyed, however, distinctions have been made in decisions involving election laws between results which followed in violation of statutes held to be mandatory and the consequences of a breach of a statute held to be directory.

We thus conclude, under the facts that you have submitted, that Mr. McFadden would be entitled to have his name appear first on the ballot.

Very truly yours,



JOHN ASHCROFT
Attorney General

Enclosures: Op. No. 37,
6/4/54, Hamilton

Op. No. 100,
2/13/64, Schellhorn

Op. No. 99
5/12/44, Woodward



Attorney General of Missouri

JOHN ASHCROFT
ATTORNEY GENERAL

JEFFERSON CITY

65101

(314) 751-3321

June 1, 1978

OPINION LETTER NO. 119

Honorable Milt Harper
Prosecuting Attorney
Boone County Courthouse
Columbia, Missouri 65201

Dear Mr. Harper:

This letter is in response to your question asking:

"Can a county court in a second class county set a speed limit lower than twenty-five miles per hour on a county road where the lower speed is necessitated due to hazardous road conditions, school zones with poor sign distances, internal roads of high density mobil home parks (where roads previously dedicated to county), handicapped crossings, etc.?"

In particular you refer to Boone County which is a second class county containing a state university. You also refer to House Bill No. 286, First Regular Session, 79th General Assembly, which provides:

"SECTION 1. Notwithstanding other provisions of law, the county court of any county of the second class may set a speed limit on any county road, not within the limits of any incorporated city, town, or village, lower than that otherwise provided by law. However, in no case shall the speed limit be set lower than twenty-five miles per hour. The court shall send copies of any

Honorable Milt Harper

such order to the superintendent of the state highway patrol. After the roads have been properly marked by signs indicating the speed limits set by the county court, the speed limits so set shall be in full force and effect.

"SECTION 2. Any person who violates any provision of this act is guilty of a misdemeanor and upon conviction shall be punished as provided by law.

"SECTION 3. The limits on speed set by this section do not apply to the operation of any emergency vehicle as defined in Section 304.022, RSMo. Nothing in this act shall make the speeds prescribed therein lawful in a situation that requires lower speed for compliance of the basic rule declared in Sub Section 1 of Section 304.010, RSMo."

The three sections of that bill are now numbered respectively Sections 49.267, 49.269 and 49.268, V.A.M.S.

You have also referred to Section 304.010, RSMo Supp. 1975. Subsection 5 of that section provides:

"The county court of any county of the second class containing one hundred twenty-five thousand or more inhabitants or a county of the second class containing a state university may set a speed limit on any county road not within the limits of any incorporated city, town or village, lower than that otherwise provided in this section where the condition of the road or nature of the area requires a lower speed. The court shall cause copies of any order establishing a speed limit on a county road to be sent to the chief engineer of the state highway department and the superintendent of the state highway patrol. After the roads have been properly marked by signs indicating the speed limits set by the county court, the speed limits shall be effective as those provided in this section."

Honorable Milt Harper

Subsection 1 of Section 304.010 provides:

"Every person operating a motor vehicle on the highways of this state shall drive the vehicle in a careful and prudent manner and at a rate of speed so as not to endanger the property of another or the life or limb of any person and shall exercise the highest degree of care."

The title of House Bill No. 286 provides:

"AN ACT relating to motor vehicle speed limits in certain second class counties, with penalty provisions." (emphasis added)

"'Since the title of an act is essentially a part of the act and is itself a legislative expression of the general scope of the bill, it may be looked to as an aid in arriving at the intent of the legislature.' . . ." In re Tompkins' Estate, 341 S.W.2d 866, 871 (Mo. 1960). Here the title reflects a limitation on the scope of the act to "certain second class counties". Notable also in this respect is the fact that the title of the bill as originally introduced did not contain the word "certain" or the words "with penalty provisions."

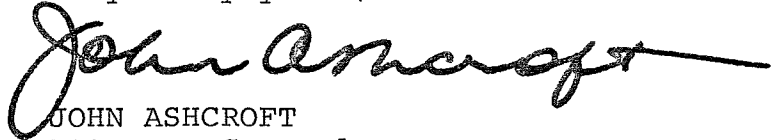
Further, the bill as originally introduced did not contain the provision that in no case shall the speed limit set by the county court be lower than twenty-five miles per hour or the present sections 2 and 3. We believe both the provisions of subsection 5 of Section 304.010 and the provisions of House Bill No. 286 have to be given effect. That is, it is axiomatic that repeals by implication are not favored and generally a special statute controls over a general statute. Reading these statutes in light of what we believe to be the legislative intent leads us to the conclusion that the authority given Boone County to set speed limits on county roads not within the limits of any incorporated city, town or village, lower than that otherwise provided in Section 304.010 where the condition of the road or nature of the area requires a lower speed, was not repealed by implication by House Bill No. 286. Certainly there was no express repeal of subsection 5 of Section 304.010.

Thus, we conclude that House Bill No. 286 does not affect the authority given to the Boone County Court by subsection 5 of Section 304.010.

Honorable Milt Harper

We do not find it necessary to go into a general discussion of House Bill No. 286 in view of the conclusion that we have reached with respect to Boone County.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John Ashcroft", with a long horizontal flourish extending to the right.

JOHN ASHCROFT
Attorney General



JOHN ASHCROFT
ATTORNEY GENERAL

Attorney General of Missouri

JEFFERSON CITY

(314) 751-3321

65101

July 12, 1978

OPINION LETTER NO. 120

Mr. Robert S. Townsend
Acting Director
Department of Natural Resources
1014 Madison Street
Jefferson City, Missouri 65101

Dear Mr. Townsend:

This is in response to your recent opinion request, wherein you ask:

"Do Sections 444.500 to 444.755, RSMo Supp. 1975, as amended by H.B. 934, 79th General Assembly, Second Regular Session, provide the Land Reclamation Commission with the authority to enforce and administer the initial regulatory program established pursuant to Sections 502(b), 502(c), and 510(d) of PL 95-87, and the regulations promulgated at 30 C.F.R. §700, et seq., 42 F.R. 62639-62716 (December 13, 1977)?"

Public Law 95-87, enacted on August 3, 1977, establishes a federal program for the control of strip mining of coal, and the reclamation of lands affected by strip mining operations. The program is divided into two stages, an initial or interim program, and a final regulatory program. During the interim program, mine operators must meet certain of the performance standards set out in the law, while others of the performance standards are not applicable until the final program becomes effective. Under the federal law states are eligible for grant funds during the interim program if they have the authority to enforce the performance standards which are referenced in Sections 502(c) and 510(d) of PL 95-87.

We have carefully examined Section 444.535, enacted by H.B. 934, 79th General Assembly, Second Regular Session, and PL 95-87. Section 444.535 contains language substantially identical to

Mr. Robert S. Townsend

that contained in the portions of Section 515 of PL 95-87 which are referenced in Section 502(c), as well as those referenced in Section 510(d). The only significant change from the federal language is that in Section 444.535 the term "strip mining" is used in place of the federal term "surface coal mining operations". It is apparent that Section 444.535 was drafted with PL 95-87 in mind. In fact, the title to H.B. 934 makes reference to "reclamation performance standards mandated by federal law. . . ." Because of this virtual identity of language, it is our opinion that Section 444.535 provides to the Land Reclamation Commission the authority to enforce and administer the performance standards of the interim program mandated by PL 95-87, except insofar as the definitions of the terms strip mining and surface coal mining operations produce a different result.

These two terms are central to the scope of the regulatory program under the state and federal laws, for in each case performance standards for mining and reclamation are generally applicable only to those operations falling within the definition of the referenced term. Strip mining is defined in the state law thus:

" . . . mining by removing the overburden lying above natural deposits of coal . . . and mining directly from the natural deposits thereby exposed, and includes mining of exposed natural deposits of coal . . . over which no overburden lies." Section 444.510(18).

In order to determine the exact scope of this term, the definition of "overburden" must also be considered. It is defined thus:

" . . . all of the earth and other materials which lie above natural deposits of coal . . . and includes such earth and other materials disturbed from their natural state in the process of strip mining." Section 444.510(10).

When the definitions of both these terms are considered, it becomes apparent that the Missouri law, Sections 444.500 to 444.755, V.A.M.S., prior to the enactment of H.B. 934 required reclamation only of those lands which were directly disturbed in the process of excavating the coal. Two exceptions to this proposition existed under the statute prior to H.B. 934, which will be discussed later.

Mr. Robert S. Townsend

Under the federal reclamation law, the scope of the regulation is not so narrowly limited. "Surface coal mining operations" is defined in Section 701(28) of PL 95-87. The definition is too long to be set out here. Suffice it to say that the term includes a wide range of facilities, structures and activities which are constructed on or conducted at sites away from the actual pit or excavation area, but which are directly related to the mining function, such as coal cleaning operations, loading of coal, waste disposal, and haul roads and access roads. Thus, it appears that the intent of the federal law is to regulate and require reclamation of areas which are subject to some disturbance or use during the overall mining operation, but which are outside of the area which is directly disturbed during the excavation process.

As pointed out above, the Missouri law prior to H.B. 934, with two exceptions, did not require reclamation of areas other than those directly disturbed during the excavation of coal. The first of these exceptions is that any area upon which overburden is placed must be reclaimed, even if such area is not at the actual mine site, because Section 444.610.1(8) requires that all affected lands be reclaimed. Affected land is defined in Section 444.510(1) to include land upon which overburden has been deposited. Thus, where overburden has been placed at a location away from the mine site, such as in constructing haul roads of this material, that area must be reclaimed.

Second, certain wastes known as gob, produced during coal cleaning operations, must be buried, whether or not they are produced on affected land. Section 444.510.1(7) provides that "[g]ob shall be covered to a depth of not less than two feet with earth or spoil material capable of supporting plant life. . . ." Although all of the land care requirements of Section 444.610.1 are expressly made a condition of the permission to engage in strip mining upon the permitted lands, there is no indication in the statutory language that the requirement as to burial of gob applies only to affected lands. Nor does the definition of gob so limit its effect. Gob is defined thus:

" . . . that portion of refuse consisting of waste coal or bony coal of relatively large size which is separated from the marketable coal in the cleaning process or solid refuse material, not readily waterborne or pumpable, without crushing." Section 444.510(6).

In addition, we are informed that coal cleaning operations normally occur away from the mine site, on land which does not fall within

Mr. Robert S. Townsend

the definition of affected land. Thus, it appears that the legislature intended to require the burial of gob at any place where it is deposited, whether or not on affected land.

Section 444.535, H.B. 934, places requirements on strip mining operations in addition to those contained in Sections 444.500 to 444.755, V.A.M.S. As noted above, the language used in Section 444.535 is substantially identical to the language Congress used to impose the performance standards of the interim program, except that the term strip mining was used in place of the term surface coal mining operations. Thus, the scope of regulatory authority under Section 444.535 is less than that under the interim program established by PL 95-87, insofar as the types of operations, structures and facilities located away from the pit area are concerned. However, Section 444.535 does contain language evidencing a legislative intent to broaden to some extent the area subject to regulation.

Although the performance standards set out in Section 444.535.1 are "with respect to strip mining of coal", paragraph (5) of subsection 1 is cast in terms that clearly apply to areas outside the mine site itself. That paragraph provides that the operator shall:

"(5) Minimize the disturbances to the prevailing hydrologic balance at the mine site and in associated off-site areas and to the quality and quantity of water in surface and ground water systems both during and after strip mining operations and during reclamation by:

* * *

"(b) Conducting strip mining operations so as to prevent, to the extent possible using the best technology available, additional contributions of suspended solids to stream flow, or run-off outside the permit area, . . .

"(c) Constructing any siltation structures pursuant to paragraph (b) of this subdivision prior to commencement of strip mining operations, such structures to be certified by a registered professional engineer to be constructed as designed and approved in the reclamation plan;

Mr. Robert S. Townsend

"(d) Cleaning out and removing temporary or large settling ponds or other siltation structures from drainways after disturbed areas are revegetated and stabilized; and depositing the silt and debris at a site and in a manner approved by the commission; . . ." Section 444.535.1(5).

We believe that the references to "associated off-site areas", and to preventing "additional contributions of suspended solids to stream flow, or run-off outside the permit area", are a clear indication that the legislature intended to expand the bounds of the Commission's regulatory jurisdiction beyond those areas defined as affected land.

Moreover, subparagraph 5(c) requires any siltation structures required to meet the command of subparagraph (b) to be constructed prior to commencing strip mining operations. It is obvious that those structures cannot be constructed prior to mining unless they are placed outside the area which will become affected land. In addition subparagraph (5)(d) regulates the manner in which the siltation structures are cleaned out and removed after reclamation of disturbed areas is completed. Thus, the legislature clearly authorized the Land Reclamation Commission to regulate off-site operations, as those operations relate to minimizing disturbances to the hydrologic balance, both at the mine site and at associated off-site areas.

Furthermore, Section 444.535.1(6) empowers the Commission to regulate the design, location, construction, operation, maintenance, enlargement, modification, and removal or abandonment of all coal mine waste piles which are used as dams or embankments. This provision is cast in the broadest of terms, and does not appear to be limited solely to those dams or embankments which are located upon affected lands. It includes tailings and coal processing wastes, which would not normally be produced upon affected land. We believe that the legislature intended for the Land Reclamation Commission to regulate such structures wherever located, where the activities producing those structures are related to the mining operations.

In summarizing our comparison of Sections 444.500 to 444.755, as amended by H.B. 934, with the interim program requirements of PL 95-87, we are of the opinion that the state statutes do not provide the Land Reclamation Commission with the authority to carry out all of the requirements of the interim program. However, we believe that the Commission falls short of the authority required by PL 95-87 only with respect to operations, facilities and structures which are located outside any affected land, except where the regulation of such operations, facilities

Mr. Robert S. Townsend

or structures is for the purpose of minimizing disturbances to the prevailing hydrologic balance at the mine site or associated off-site areas, or for the purpose of burial of gob, or the structure is a dam or embankment consisting of mine wastes, tailings, coal processing wastes or other wastes. Where one of the above exceptions exists, the Land Reclamation Commission has the authority to regulate such activities, facilities and structures even though they are not located upon affected lands.

We are of the view that the performance standards set out in H.B. 934 became effective on the effective date of that bill, May 3, 1978. Any coal strip mining conducted on or after May 3, 1978, will have to meet the performance standards set out in Section 444.535, unless otherwise exempted therefrom.

It is our view that Sections 444.500 to 444.755, V.A.M.S., as amended by H.B. 934, 79th General Assembly, Second Regular Session, provide the Land Reclamation Commission with the authority to enforce and administer the initial or interim regulatory program established pursuant to Sections 502(b), 502(c) and 510(d) of PL 95-87, except as to those operations, facilities and structures which are not located upon affected lands, and which are not subject to regulation under Section 444.535.1(5) and (6), H.B. 934, or are not related to the disposal of gob. It is our further view that coal strip mine operators must comply with the requirements set out in Section 444.535 after May 3, 1978, the effective date of H.B. 934.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John Ashcroft", with a long horizontal flourish extending to the right.

JOHN ASHCROFT
Attorney General

Attorney General of Missouri

JEFFERSON CITY

JOHN ASHCROFT
ATTORNEY GENERAL

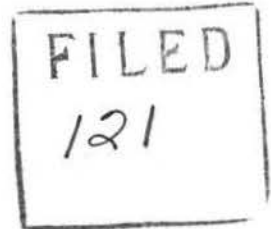
(314) 751-3321

65101

September 26, 1978

OPINION LETTER NO. 121

Honorable George K. Hoblitzelle
State Representative, District 75
42 Glen Eagles
St. Louis County, Missouri 63124



Dear Representative Hoblitzelle:

This is in response to your request for an Opinion of the Attorney General on the following three questions with respect to Section 66.620 VAMS:

"(1) If a municipality was initially classified under the 'Group A' (location of sale) method of distribution and effectively transferred to the 'Group B' (population ratio) method of distribution, when must such municipality adopt an ordinance (as specified in the Act) and notify the Director of Revenue if the municipality wishes to transfer back to the 'Group A' (location of sale) method of distribution, utilizing the 1980 permissive transfer authority?

"(2) If a municipality has effectively transferred back to the 'Group A' (location of sale) in the manner and under the facts set forth in the first inquiry, may that same municipality once again transfer to the 'Group B' (population ratio) method of distribution?

Honorable George K. Hoblitzelle

"(3) If a municipality is classified within the 'Group B' (population ratio) method of distribution, and subsequent in time to the most recent Federal decennial census and the most recent census that determined the total population of the County wherein the municipality is situated and all political subdivisions therein, the municipality annexes additional territory and properly notifies the Director of Revenue thereof, are the residents of the newly annexed territory counted in determining the population figure for purposes of distribution of sales tax revenues? If the answer to the inquiry is affirmative, what is the acceptable procedure under the Act for determining such population?"

In response to your first inquiry, it is the opinion of the Attorney General that Subsection 2 of Section 66.620 authorizes a Group A city, which has previously transferred into Group B, to transfer back into Group A by action of its governing body during 1980 and every tenth year thereafter only. The pertinent language of Subsection 2 is as follows:

"Beginning in 1980 and during every tenth year thereafter only, any such city, town or village which transfers from Group A to Group B may by adoption of an ordinance by its governing body cease to be a part of Group B and once again become a part of Group A. Within ten days after the adoption of the ordinance transferring the city, town or village from one group to the other, the clerk of the transferring city, town or village shall forward to the director of revenue, by registered mail, a certified copy of the ordinance. Distribution to such city as a part of its former group shall cease and as a part of its new group shall begin on the first day of January of the year following notification to the director of revenue, provided such notification is received by the director of revenue on or before the first day of July of the year in which the transferring ordinance is adopted. If such notification is received by the director of

Honorable George K. Hoblitzelle

revenue after the first day of July of the year in which the transferring ordinance is adopted, then distribution to such city as a part of its former group shall cease and as a part of its new group shall begin the first day of January of the second year following such notification to the director of revenue."

The primary rule of statutory construction indicates that the intention of the legislature is to be discerned from the words of the statute itself, and, that the words of the statute are to be given their plain and ordinary meaning. State v. Kraus, 530 S.W.2d 684 (Mo. banc 1975); State ex rel. Zoological Park Subdistrict v. Jordan of the City and County of St. Louis, 521 S.W.2d 369 (Mo. 1975). In this instance the language of the statute states that the governing bodies of qualifying cities, towns and villages are granted authority to act, by passing an ordinance, in the years 1980, 1990, 2000, etc., but in no other years. That is, the governing body of the city may take the necessary action to pass the transferring ordinance only during calendar year 1980 and every tenth year following. The effective date of the transferring ordinance depends upon the date of certification to the Director by the clerk of the city transferring back into Group A. If the notification is received prior to July 1 of the year in which the ordinance is passed, it would become effective on the 1st of January of the year following. If notification is received after July 1 of the year in which the ordinance is passed, the ordinance would become effective on January 1 of the second year following.

Cities and other subdivisions of the State of Missouri only have such powers as are specifically granted to them by the General Assembly or necessarily implied in the grant of authority. State ex rel. City of Blue Springs v. McWilliams, 335 Mo. 816, 74 S.W.2d 363 (1934); City of Richmond Heights v. Shackelford, 446 S.W.2d 179 (St.L.Ct.App. 1969); City of Bellefontaine Neighbors v. J. J. Kelley Realty and Building Company, 460 S.W.2d 298 (St.L.Ct.App. 1970). Further, "Any reasonable doubt concerning whether or not a municipal corporation possesses a given power must be resolved in the negative." State ex rel. Crites v. West, 509 S.W.2d 482, 484 (Mo.Ct.App. at Spr. 1974). Therefore, since the General Assembly authorized the governing bodies of qualifying cities to act "beginning in 1980. . ." it is clear that the governing body of a city may not pass an ordinance in any year other than 1980 in an attempt to have the transferring ordinance become effective in 1980.

Honorable George K. Hoblitzelle

In response to your second inquiry, it is the opinion of this office that a qualifying city, having once exercised its option to transfer into Group B, could elect to transfer back into Group A only once. Again, the language of Section 66.620, given its plain and ordinary meaning, clearly reveals the intention of the legislature. Subsection 2 provides:

"Once a Group A city, town or village becomes a part of Group B, such city may transfer back to Group A only once."

The language of the legislature permits no other interpretation. Inasmuch as Section 66.620 contains no express limitation on the number of times a Group A city may elect to transfer into Group B, it is our opinion that a city, which began in Group A, transferred to Group B, and transferred back into Group A, may elect to transfer back into Group B. This transfer would be the final transfer available to that city.

Your third inquiry consists of two parts: First, whether the expansion of a Group B city by annexation will alter the distribution of tax revenues to that city; and second, if the population of the annexed area is to be considered for the purposes of disbursement to the Group B city, how must the population be determined? Again Section 66.620 provides the primary guidance for the response to this question.

Subsection 2 of Section 66.620 sets out the distribution scheme for the proceeds of county sales tax. It also states:

"For the purpose of sections 66.620 to 66.635, population shall be as determined by the last federal decennial census or the latest census that determines the total population of the county and all political subdivisions therein. . . ."

Subsection 3 of Section 66.620 indicates that, should the boundaries of a city be altered or expanded, the clerk of the municipality is required to forward a certified copy of the ordinance adding territory to the director of revenue. It further provides:

". . . Upon receipt of the ordinance and map, the tax imposed by sections 66.660 to 66.635 shall be redistributed and allocated in accordance with the new boundary disposition on the effective date of the change of the municipal boundary. . . ."

Honorable George K. Hoblitzelle

By virtue of Section 1.100, RSMo Supp. 1975, the State of Missouri relies upon the federal decennial census to determine the population of all political subdivisions within the state unless otherwise specified. As noted above, Section 66.620 specifically provides that the federal decennial census will be used to determine population for the purposes of Section 66.620. Such section also contains the language ". . . or the latest census that determines the total population of the county and all political subdivisions therein." This quoted language no doubt was made a part of the statute because of the holding of the Supreme Court of Missouri in the case of City of Bridgeton v. Gilstrap, 463 S.W.2d 908 (Mo. banc 1971) where the Court held that special municipal census could not be used to determine the new population of a city for the purposes of allocation of cigarette tax receipts among the county and municipalities within the county. The total tax revenue was to be allocated according to the population ratios in much the same way as the county sales tax is to be allocated among the various components of "Group B." Thus, the language of the statute and the case law are to the effect that a census will not be given effect unless it determines both the population of the entire county and the population of each political subdivision therein. Any powers of a municipality to take a census cannot extend beyond its own physical boundaries. Thus, such a special census could not be used to determine the population of the city for the purposes of the "Group B" distribution.

A review of the relevant statutes and charter provisions indicates that no authority exists for the taking of a census of an entire county except under the decennial census. The language of the statute authorizing the use of the "latest census" merely provides that if, at a future date, such census authority should come into being, it could be given effect without amending Section 66.620. Section 66.620 creates no census authority in itself.

The population of a city, town or village is itself important only in the computation of the distributions of the sales tax to the various cities and unincorporated areas in Group B. The Group B distribution is based upon population ratios alone, and not on physical boundaries. Changes in boundaries can be verified with no difficulty, but changes in population can be verified only by a census which determines the population of the entire county and all its political subdivisions.

Honorable George K. Hoblitzelle

For the foregoing reasons, it is the opinion of this office that the population of the various entities in "Group B" shall be determined once every ten years by the Federal decennial census, unless the legislature creates some other census authority which would determine the population of the entire county and its political subdivisions. However, if the Federal Bureau of Census in Washington, D. C. is able to determine the population of the annexed area from the last decennial census, then, under the rationale of Attorney General's Opinion No. 407 (1964), copy attached, the population of the annexed area, as of the last decennial census, would be included in determining the distribution to the Group B city involved.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John Ashcroft", with a stylized, flowing script.

JOHN ASHCROFT
Attorney General

Enclosure: Op. Ltr. No. 407
12/10/64, Yocum

Attorney General of Missouri

JOHN ASHCROFT
ATTORNEY GENERAL

JEFFERSON CITY

(314) 751-3321

65101

October 17, 1978

OPINION LETTER NO. 122

Honorable Timothy J. Patterson
Prosecuting Attorney of Jefferson County
P. O. Box 246
Hillsboro, Missouri 63050

Dear Mr. Patterson:

This is in response to your request for an opinion on the following question:

"Is the payment of a \$45.00 appraisal fee a bona fide expense under the section 408.052 (1) where the appraiser is also a member of the board of directors of the lending institution which requires the appraisal or is this fee usurious?"

In your opinion request you further point out:

"Joachim Federal Savings & Loan, a lender as defined in section 408.015 (4) R.S. MO. has seven directors on its Board of Directors. These directors all receive directors fees. Three of these directors do appraisal work for the company, but none of the three are employees or are they on the payroll.

"The appraisers are paid \$15.00 each by the persons applying for a loan. Joachim Federal Savings & Loan receives the \$45.00 and pays it over to each of the parties. Joachim Federal Savings & Loan charges a 1% loan service fee of each person who takes out a deed of trust through them.

Honorable Timothy J. Patterson

"Appraisals are required for each loan. Independent appraisers charge an average of \$75.00 to \$80.00. For \$45.00, the three directors do the same work. No charge at all is made if the loan is not granted."

With respect to residential real estate loans, Section 408.052.1, RSMo Supp. 1975, provides in part:

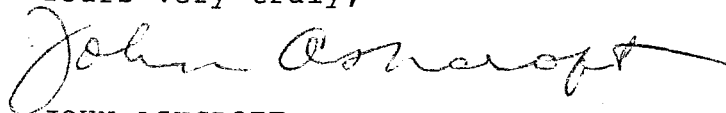
"No lender shall charge, require or receive, on any residential real estate loan, any points or other fees of any nature whatsoever, excepting a one percent origination fee, whether from the buyer or the seller or any other person, except that the lender may charge bona fide expenses paid by the lender to third parties for services actually performed in connection with a loan. . . ."

Our office has had occasion to render an opinion concerning whether a lender is prohibited from charging borrowers in connection with residential real estate loans for appraisals and credit investigations performed by a wholly owned subsidiary of the lender. In that opinion, Opinion Letter No. 82, June 28, 1976, to Young, we determined that wholly owned subsidiaries are not third parties as that term is used in Section 408.052.1. We recognize that there is no authoritative definition of the term "third parties" which determines the question. Therefore, we examined the meaning of the term in light of the purpose of the section and the changes the legislature intended to make by enacting that section.

We believe that there is an analogy between this situation and the situation which arose in Opinion Letter No. 82. Obviously, the lender is using its own directors for the appraisal of the property which will secure the loan. These are not disinterested third parties or independent appraisers but are actually officers of the lender. Inasmuch as they are officers of the lender, we do not believe that they were intended to fall within the definition of third parties as contemplated by the statute. Therefore, while the expense of an appraisal may be a bona fide expense, we do not believe that it can be properly charged to the buyer inasmuch as it is not an expense paid by the lender to third parties pursuant to Section 408.052.1.

It is our view that Section 408.052.1 prohibits a lender from charging borrowers in connection with appraisals for residential real estate loans by one of the directors of the lender.

Yours very truly,



JOHN ASHCROFT
Attorney General

Enclosure: Op.Ltr.No. 82
6-28-76, Young

Attorney General of Missouri

JOHN ASHCROFT
ATTORNEY GENERAL

JEFFERSON CITY

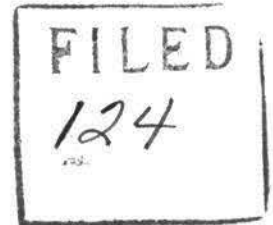
(314) 751-3321

65101

June 22, 1978

OPINION LETTER NO. 124

Dr. Arthur L. Mallory, Commissioner
Department of Elementary & Secondary
Education
Jefferson State Office Building
Jefferson City, Missouri 65102



Dear Dr. Mallory:

In accordance with your request of May 24, 1978, we have reviewed the Missouri State Department of Elementary and Secondary Education's "Application for Federal Assistance - Migrant Education Program (fiscal year 1979)." This application is being submitted under Title I of the Elementary and Secondary Education Act of 1965, P.L. 89-10, as amended. See 20 U.S.C. Section 241c-2.

In addition to the Elementary and Secondary Education Act of 1965, as amended, and the regulations propounded pursuant thereto (45 C.F.R. 116, October 1, 1976 edition), our review has taken into consideration Article III, Section 38(a), Missouri Constitution, and Section 161.092, RSMo Supp. 1975.

Based on the foregoing, we hereby certify that the Missouri State Department of Elementary and Secondary Education has authority under state law to perform the duties and functions of a "state educational agency" as defined in Title I of Public Law 89-10 (20 U.S.C. Section 244), including those arising from the assurances set forth in the application.

This opinion letter constitutes our official certification and should be inserted in the appropriate place in each copy of the application.

Very truly yours,

JOHN ASHCROFT
Attorney General

REAL ESTATE BOARD:
REAL ESTATE COMMISSION:

The use of a guaranteed home purchase program as an inducement to obtain customers is a violation of Section 339.100(12), Senate Bill No. 811, 79th General Assembly, Second Regular Session.

OPINION NO. 126

October 19, 1978

Mr. James R. Butler, Director
Department of Consumer Affairs,
Regulation & Licensing
505 Missouri Boulevard
Jefferson City, Missouri 65101



Dear Mr. Butler:

This opinion is issued in response to your predecessor's request concerning the following question:

"Does the guaranteed home purchase program violate Section 339.100, RSMo?"

This opinion is based upon an interpretation of the provisions of Section 339.100, Senate Bill No. 811, 79th General Assembly, Second Regular Session. Section 339.100.2(12) provides in pertinent part:

"2. The commission may cause a complaint to be filed with the administrative hearing commission as provided by law when the commission believes there is a probability that a licensee has performed or attempted to perform any of the following acts:

* * *

(12) Using prizes, money, gifts or other valuable consideration as inducement to secure customers to purchase, lease, sell or list property when the awarding of such prizes, money, gifts or other valuable consideration is conditioned upon the purchase, lease, sale or listing; or soliciting, selling or offering

for sale real property by offering free lots, or conducting lotteries or contests, or offering prizes for the purpose of influencing a purchaser or prospective purchaser of real property;"

The submitted facts indicate that a guaranteed home purchase program is a method used by brokers to encourage potential customers to list their home for sale with a particular real estate company or to purchase a listed home. The broker usually promises in his advertising that his company will guarantee that a seller's home will be sold by a certain date, if the home meets certain unspecified criteria. If the home is not sold the broker promises that his company will purchase the home for a certain percentage of the fair market value of the property.

Examples of the advertising utilized in connection with a guaranteed home purchase program include the following:

- "1) If your home qualifies, the X company will purchase your home at the fair market value, at a specified time, in order for you to purchase another home, meet a transfer date, or relieve you of the burden of temporary financing.
- "2) For prime property, when you list the guaranteed way it's sold, we guarantee it in writing.
- "3) Up to 92% guaranteed for property that qualifies when you list the guaranteed way it's sold, we guarantee it in writing.
- "4) Up to 94% guarantee sale of your house on a 60-90-120 day listing, when you list the guaranteed way it's sold.
- "5) Guaranteed sales program, with 95% advanced equity available. When you decide to purchase a pre-owned or new home, an agreement can be arranged on your present home which guarantees your home will be sold by the time specified in the agreement."

Subsection (12) replaces former Section 339.100(11), RSMo 1969, which stated:

Mr. James R. Butler

"The commission may upon its own motion, and shall upon written complaint filed by any person, investigate the business transactions of any real estate broker or real estate salesman and shall have the power to suspend or revoke any license obtained by false or fraudulent representation or if the licensee is performing or attempting to perform any of the following acts or is deemed to be guilty of:

* * *

"(11) Soliciting, selling, or offering for sale real property by offering free lots, or conducting lotteries, or contests, or offering prizes for the purpose of influencing a purchaser or prospective purchaser of real property."

The altered language is relevant to the facts under consideration in this opinion because the new subsection prohibits the use of other valuable consideration as an inducement to purchase or list property when receipt of the consideration is conditioned upon the purchase or listing.

The extensive advertising of guarantees demonstrates that the programs are being utilized to attract listings or to influence potential purchasers. Such programs are therefore used as inducements.

The primary question is whether such guarantees or promises constitute valuable consideration within the meaning of Section 339.100(12). The term "consideration" is frequently defined by the courts with reference to the validity of contracts. The Missouri Supreme Court has stated that:

"... A valuable consideration 'may consist of some right, interest, profit or benefit accruing to one party, or some forbearance, loss or responsibility given, suffered or undertaken by the other.' . . ."
Charles F. Curry and Company v. Hedrick,
378 S.W.2d 522, 533 (Mo. 1964).

A similar position was recently expressed in Reed, Roberts Associates, Inc. v. Bailenson, 537 S.W.2d 238, 240 (Mo.Ct.App. at St.L. 1976):

Mr. James R. Butler

" . . . Consideration is something moving from one party to the other; and it can be in form of a legal benefit or detriment. . . ."

The most applicable Missouri case is Mohawk Real Estate Sales, Inc. v. Crecelium, 424 S.W.2d 86, 90-91 (St.L.Ct.App. 1968). In Mohawk the court held that a legal obligation to buy a parcel of real property if the owner decided not to retain it within three years was adequate consideration to validate the remaining terms of the contract. The court stated:

""(1) Consideration for a promise is

- (a) an act other than a promise, or
- (b) a forbearance, or
- (c) the creation, modification or destruction of a legal relation, or
- (d) a return promise,

bargained for and given in exchange for the promise.

(2) Consideration may be given to the promisor or to some other person. It may be given by the promisee or by some other person.""

Any broker who contractually promises to purchase the real property of a customer upon the occurrence of certain conditions is suffering a legal detriment. In return the owner promises to list his property with the broker. It is evident that the broker's guarantee is a form of valuable consideration covered by the terms of subsection (12).

Furthermore, since no guarantee is forthcoming if the property is not listed with the broker, the offered inducement is entirely conditional in nature. Therefore, the third requirement set forth in subsection (12) is met.

In summary, it is our opinion that if a guaranteed sales program is used to attract listings or influence potential buyers then subsection (12) is applicable.

Mr. James R. Butler

CONCLUSION

It is the opinion of this office that the use of a guaranteed home purchase program as an inducement to obtain customers is a violation of Section 339.100(12), Senate Bill No. 811, 79th General Assembly, Second Regular Session.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Jerry L. Short.

Very truly yours,


JOHN ASHCROFT
Attorney General



Attorney General of Missouri

JOHN ASHCROFT
ATTORNEY GENERAL

JEFFERSON CITY
65101

(314) 751-3321

June 9, 1978

OPINION LETTER NO. 128

Honorable James C. Kirkpatrick
Secretary of State
State Capitol Building
Jefferson City, Missouri 65101

Dear Mr. Kirkpatrick:

In response to your letter of June 1, 1978, we have prepared the following ballot title for a constitutional amendment proposed by the initiative:

Increases the motor vehicle fuel tax from seven cents a gallon to ten cents a gallon until changed by law. Increases the counties' share of the net proceeds of the tax from 5% to 15%.

Very truly yours,

A handwritten signature in dark ink, reading "John Ashcroft", is written over the typed name.

JOHN ASHCROFT
Attorney General

Attorney General of Missouri

JOHN ASHCROFT
ATTORNEY GENERAL

JEFFERSON CITY

(314) 751-3321

65101

June 22, 1978

OPINION LETTER NO. 129

Dr. Arthur L. Mallory, Commissioner
Department of Elementary and Secondary
Education
Jefferson State Office Building
Jefferson City, Missouri 65102



Dear Dr. Mallory:

This letter is in response to your request for our review and certification of the State Board of Education's state plan for the administration of vocational education under the Vocational Education Amendments Act of 1968, as amended.

Our review has taken into consideration the Vocational Educational Act of 1963, P.L. 88-210, as amended; the Vocational Amendments Act of 1968, P.L. 90-576, as amended; the Education Amendments of 1976, P.L. 94-482; the applicable federal regulations (45 C.F.R. Parts 100, 102, 103, 104 and 105, October 3, 1977); Article III, Section 38(a), Article IV, Section 15, and Article IX, Sections 1(b), 2(a), and 2(b), Missouri Constitution; Sections 161.092, 161.112, 161.122, and 178.430 through 178.580, V.A.M.S.

It is the opinion of this office that:

1. The Missouri State Board of Education is the state agency solely responsible for the administration of vocational education in Missouri and is, therefore, the "State Board" as that term is defined in 20 U.S.C. Section 1248(8);

2. The Missouri State Board of Education has the authority under state law to submit a state plan for the administration of vocational education;

Dr. Arthur L. Mallory

3. The Missouri State Board of Education has the authority to administer or supervise the administration of the foregoing state plan;

4. All provisions contained in the foregoing state plan are consistent with state law;

5. The Commissioner of the Missouri Department of Elementary and Secondary Education has been duly authorized by the Missouri State Board of Education to submit the foregoing state plan to the United States Commissioner of Education and to represent the Missouri State Board of Education in all matters relating thereto.

In conjunction with this letter opinion which constitutes our official certification of the application, we have completed the required certification forms.

Very truly yours,

JOHN ASHCROFT
Attorney General

Attorney General of Missouri

JOHN ASHCROFT
ATTORNEY GENERAL

JEFFERSON CITY

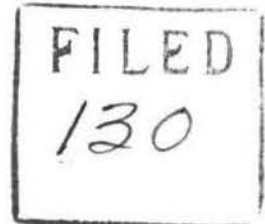
(314) 751-3321

65101

June 22, 1978

OPINION LETTER NO. 130

Dr. Arthur L. Mallory, Commissioner
Department of Elementary and Secondary
Education
Jefferson State Office Building
Jefferson City, Missouri 65102



Dear Dr. Mallory:

This letter is in response to your request for our review and certification of the Department of Elementary and Secondary Education's Fiscal Year 1979 Annual Program Plan under Part B of the Education of the Handicapped Act, as amended by Public Law 94-142 (20 U.S.C. §§ 1401 et seq., as amended).

In addition to the Education of the Handicapped Act, as amended, and regulations promulgated pursuant thereto (45 CFR Part 121a (August 23, 1977)), our review has taken into consideration Article IX, Sections 1(a), 2(a) and 2(b), Missouri Constitution; Sections 161.092, and 162.670 to 162.995, RSMo Supp. 1975, and related provisions.

It is the opinion of this office that:

1. The Missouri State Department of Elementary and Secondary Education is the State educational agency as defined in 20 U.S.C. § 1401(7) and has authority under state law to submit the plan and to administer or to supervise the administration of the plan.
2. All plan provisions are consistent with state law.

Very truly yours,

JOHN ASHCROFT
Attorney General

June 23, 1978

OPINION LETTER NO. 131
Answer by Letter - Klaffenbach

Honorable George P. Dames
State Representative, 50th District
8 South Boxwood
O'Fallon, Missouri 63366



Dear Representative Dames:

This letter is in response to your question asking as follows:

"We want to know the exact number and distribution of votes to be used in the selection of officers and State Committee Members in the Second Senatorial District (S.S.H.B.101, Sections 14.040 and 14.041) (St. Charles County and a portion of St. Louis County)."

You also state:

"As per the Democrat Party State Chairman, St. Charles County will receive a total of eight votes while that portion of St. Louis County, within the Second Senatorial District, will receive a total of ten votes. As St. Charles County contains nearly two-thirds of the population and registered voters of this District, this seems highly improper and not in keeping with the "one man - one vote" principle."

It is our understanding that the Second Senatorial District consists of St. Charles County and a part of St. Louis County.

Sections 2 and 4 of Section 115.619, V.A.M.S. provide:

"2. The congressional, senatorial or judicial district committee of a district of which a county having more than one legislative district shall form a part, shall be composed of the county chairmen and vice chairmen of the several county committees, and the chairman and vice chairman of each of the several legislative districts.

* * *

"4. The congressional, senatorial or judicial district committee of a district which shall be composed in whole or in part of a part of a city or part of a county shall include as members of such committee the ward or township committeemen and committeewomen from such wards or townships included in whole or in part in such part of a city or part of a county forming the whole or a part of such district."

Subsection 2 of Section 115.621, V.A.M.S. provides:

"2. The members of each senatorial district committee shall meet at some point within the district, to be designated by the current chairman of the committee, if there be one, and if not by the chairman of the congressional district in which the senatorial district is principally located, on the Wednesday after the last Tuesday in August after each primary election. At the meeting, the committee shall organize by electing one of its members as chairman and one of its members as vice chairman, one of whom shall be a woman, and a secretary and a treasurer, one of whom shall be a woman, who may or may not be members of the committee. Having so organized, the committee shall proceed to elect two registered voters of the district, one man and one woman, as members of the party state committee."

Inasmuch as the senatorial district in question comes within subsections 2 and 4 of Section 115.619, such committee is to be composed of the county chairman and vice chairman of the county committee of the county included in the senatorial district, the chairman and vice chairman of each of the several legislative

Honorable George P. Dames

districts in the county included in the senatorial district and township committeemen and committeewomen from such townships included in whole or in part in the part of the county forming a part of such district. Therefore, the chairman and vice chairman of the St. Charles County committee and of each legislative district committee in St. Charles County and the committeemen and committeewomen from townships in St. Louis County in whole or in part in such senatorial district are members of the committee.

The senatorial district committee having once organized pursuant to subsection 2 of Section 115.621 is required to proceed to elect two registered voters of the district, one man and one woman, as members of the party state committee.

You have also suggested that the procedure provided above for the selection of the members of the senatorial district committee is improper and not in keeping with the "one man - one vote" principle. In our Opinion No. 234-1971, copy enclosed, this office concluded that the one man - one vote principle does not apply to committeemen and committeewomen in Missouri.

Very truly yours,

JOHN ASHCROFT
Attorney General

Enclosure: Op. No. 234-1971

SCHOOLS:
PUBLIC SCHOOL RETIREMENT
SYSTEM:
TEACHERS:

Senate Bill No. 906 of the Second
Regular Session, 79th General
Assembly, effective August 13,
1978, relating to membership and
prior service credit in the Public

School Retirement System of Missouri does not authorize a reapplica-
tion for election by a member of the system to pay previous with-
drawals or refunds to reinstate prior service credit.

OPINION NO. 134

August 18, 1978



Warren M. Black, Secretary
The Public School Retirement System
of Missouri
P. O. Box 268
Jefferson City, Missouri 65101

Dear Mr. Black:

This opinion is in response to your questions asking as
follows:

"S.B. 906, Second Regular Session, 79th
General Assembly, provides in Section 169.050
(5) for the reopening of the opportunity to
reinstate credit for teaching which had been
lost at termination or withdrawal, and where
the member had failed to reinstate the credit
within the time period prescribed in the present
law. The Board of Trustees has directed me
to seek your opinion on these questions:

"(1) In past years, some members have made
application to reinstate creditable service
but have failed to complete payment within the
prescribed five years. In such cases, the
applications were cancelled and the amount paid
was refunded. Does 169.050 (5) give those mem-
bers the right to reapply to purchase that credit?

"(2) Some members who have applied to reinstate
credit have applications which expire shortly be-
fore or after the effective date, [August 13,
1978] and for which they have not completed pur-
chase payments. Does Section 169.050 (5) of

Mr. Warren M. Black

S.B. 906 allow the cancellation of the present applications giving these members the opportunity to apply after the effective date with another five years to complete payments?"

Your also state:

"By deleting the phrase 'within five years after such reemployment, or before July 1, 1968, and prior to retirement' in line 60 after the word 'elect' and adding the letter 's' after 'withdrawal' and 'refund' on line 61 and after 'reinstatement' on lines 62-63, the intent seems to be that the member may purchase all withdrawn credit. However, the language remained in lines 71-73 requiring that payment must be made in five years after election. . . ."

Subsection 5 of Section 169.050 as amended by Senate Bill No. 906, Second Regular Session, 79th General Assembly, effective August 13, 1978, provides as follows:

"5. If a member withdraws or is refunded his contributions, he shall thereby forfeit any creditable service he may have; provided, however, if such person again becomes a member of the system, he may elect to reinstate any creditable service forfeited at time of previous withdrawals or refunds. The reinstatements shall be effected by the member's paying to the retirement system with interest the amount of accumulated contributions withdrawn by him or refunded to him at the time of withdrawal or refund and by teaching in the public schools of Missouri not less than seven years after returning before retirement; provided, however, that reinstatement with respect to eligibility for disability retirement shall be effective after returning and teaching not less than three years in the public schools of Missouri if such teaching makes a total of at least eight years taught in the public schools of Missouri. The payment may be made over a period of not longer than five years from the date of election, and with interest on the unpaid balance; provided, how-

Mr. Warren M. Black

ever, that if a member is retired on disability before completing such payments, the balance due with interest shall be deducted from his disability retirement allowance."

It seems clear that under the amended law it is no longer necessary to make the election to reinstate creditable service within five years after such employment, or before July 1, 1968, whichever is later. It is also obvious, as you have noted, that the latter part of subsection 5 still requires that payment be made over a period of not longer than five years from the date of election except where a member is retired on disability before completing such payment.

The clear thrust of the bill therefore, is to eliminate the requirement that such election be made within five years after such reemployment or before July 1, 1968, whichever is later. The requirement remains, however, that payment must be made over a period of not longer than five years from the date of election except as expressly provided with respect to members retiring on disability before completing such payment.

It is clear that when a statute is amended the amendment should be given its intended effect. However, provisions of any statute which is reenacted so far as they are the same as those of a prior law, are construed as a continuation of such law and not as a new enactment. Section 1.120, RSMo.

Thus, where the application constitutes a proper election under such subsection payment (including interest on the unpaid balance) must be made over a period of not longer than five years from the date of the election. By continuing this five year requirement for payment the legislature has indicated the intent that once that election has been made, whether before or after the effective date of Senate Bill No. 906, there is only five years in which to complete payment. Those who have made such elections and failed to meet such five year requirement are not, under this law, entitled to cancel such elections and make new elections.

We believe this answers both of the questions you have asked.

CONCLUSION

It is the opinion of this office that Senate Bill No. 906 of the Second Regular Session, 79th General Assembly, effective August 13, 1978, relating to membership and prior service credit in the Public School Retirement System of Missouri does not

Mr. Warren M. Black

authorize a reapplication for election by a member of the system to pay previous withdrawals or refunds to reinstate prior service credit.

The foregoing opinion which I hereby approve was prepared by my assistant, John C. Klaffenbach.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John Ashcroft", with a stylized, flowing script.

JOHN ASHCROFT
Attorney General



JOHN ASHCROFT
ATTORNEY GENERAL

Attorney General of Missouri

JEFFERSON CITY

65101

(314) 751-3321

July 5, 1978

OPINION LETTER NO. 135

Dr. Arthur L. Mallory
Commissioner, Department of
Elementary and Secondary Education
Jefferson State Office Building
Jefferson City, Missouri 65101

Dear Dr. Mallory:

We have reviewed the Missouri State Board of Education's "Fiscal Year 1979 State Plan for Vocational Rehabilitation Services under Section 101 of the Rehabilitation Act of 1973, as amended." Our review has taken into consideration the Rehabilitation Act of 1973, as amended, 29 U.S.C. §§ 701, et seq., and the regulations promulgated pursuant thereto, 45 C.F.R. §§ 1361, et seq. In addition, we have taken into consideration Article III, Section 38(a), Missouri Constitution; Chapter 161, RSMo 1969, as amended RSMo Supp. 1975; and Sections 178.590-178.630, RSMo 1969.

Based on the foregoing, we hereby certify that the Missouri State Board of Education is the state agency administering or supervising the administration of education and vocational education in the state of Missouri and is, therefore, qualified to be "the sole State agency to administer the State plan, or to supervise its administration in a political subdivision of the State by a sole local agency . . ." in accordance with 45 C.F.R. § 1361.6.

Very truly yours,

JOHN ASHCROFT
Attorney General

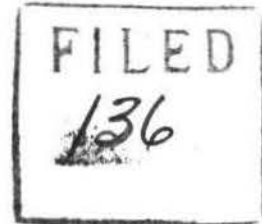
ESCHEATS:
BANKS:
CREDIT UNIONS:

Notices which are required to be
mailed by financial institutions
under S.C.S.H.C.S.H.B. 896 & 897,
Second Regular Session, 79th General
Assembly, effective August 13, 1978, relating to unclaimed property,
should be mailed promptly after August 13, 1978, and, thereafter, on
or before the first day of August as provided in such act.

OPINION NO. 136

July 21, 1978

Mr. William C. Brown, Acting Director
Department of Consumer Affairs,
Regulation, and Licensing
P. O. Box 1157
Jefferson City, Missouri 65102



Dear Mr. Brown:

This is in response to a request for an opinion from Edgar
H. Crist, Commissioner of Finance, on the following question:

"A recent enactment by the Missouri General Assembly, Senate Committee Substitute for House Committee Substitute for House Bills 896 and 897 establishes the mechanics whereby unclaimed deposits located in banks, credit unions and savings and loan associations will escheat to the state. That law requires that each depository publish notice of unclaimed deposits in the newspaper and also mail notice of the deposits to the owners thereof. With respect to the latter requirement, the law states, at Section 362.395.2.:

'The expense of the publication shall be paid by the company, and, on or before the first day of August in that year, the company shall mail, postage prepaid, to each person authorized to receive the unclaimed deposit, . . . a statement showing the amount to which the person is entitled. . . .'

Mr. William C. Brown

"It is clear from the context that the first day of August referred to is August 1, 1978. However, the statute does not take effect until August 13, 1978. Does the fact that there is a gap between the action which is prescribed by the statute and the effective date of the statute require the conclusion that the statute, or any part thereof, is invalid?"

The legislation to which you refer is Senate Committee Substitute for House Committee Substitute for House Bill Nos. 896 & 897, Second Regular Session, 79th General Assembly, which was approved by the Governor and is effective August 13, 1978. This act relates to escheats of certain unclaimed property.

Subsection 1 of Section 362.390 of the act provides:

"In the month of September in every seventh year, and beginning in September, 1978, and on or before the tenth day thereof, every national bank or trust company, every federal and state credit union, every federal and state savings and loan association, and every state bank or trust company shall make a written report, in the case of a bank or trust company to the director of the division of finance, in the case of a savings and loan to the director of the division of savings and loan supervision, and in the case of a credit union to the director of the division of credit unions, verified by the oaths of the president or vice president and cashier or assistant cashier or secretary or assistant secretary, containing a true and accurate statement of all deposits made with the company, except any deposits held in a fiduciary capacity, and all dividends declared and interest accrued upon any of its deposits or other evidences of indebtedness, which on the first day of August preceding the report amounted to fifty dollars or over and had remained unclaimed by any person or persons authorized to receive the same for a period of seven years."

Mr. William C. Brown

Subsection 1 of Section 362.395 of the act provides for publication of the required report for two successive weeks in a qualified newspaper and filing with the director of proof by affidavit of publication by the first of October thereafter.

Subsection 2 of Section 362.395 of the Act provides:

"The expense of the publication shall be paid by the company, and, on or before the first day of August in that year, the company shall mail, postage prepaid, to each person authorized to receive the unclaimed deposit, dividend or interest, at his last known place of residence or post office address, a statement showing the amount to which the person is entitled and requesting written acknowledgment thereof, together with a warning that failure to acknowledge will result in the state making claim and taking possession of such deposit, dividend, and interest, subject to the claims, supported by proof, of the apparent owner. The company may reimburse itself for its expenses by deducting the amount thereof from the sums due the person or persons who shall not have made written acknowledgment before the filing of the required reports with the director, so that such expenses are uniformly deducted from sums not acknowledged." (emphasis added)

Subsection 3 of Section 362.395 provides that for the purposes of the act, one hundred eighty days after the mailing of the statement the funds are first presumed abandoned and within thirty days after the funds are first presumed abandoned each company shall transfer such abandoned funds to the state treasurer and refile the written reports with the proper division director deducting expenses and deleting such funds that were acknowledged. Subsection 4 of Section 362.395 provides that within thirty days of the receipt of such abandoned funds the state treasurer will notify the apparent owner of the abandoned funds that the State of Missouri has claimed the abandoned funds along with an outline of the apparent owners rights.

Subsection 3 of Section 362.396 of the Act provides that claims may be filed any time within twenty-one years after the date on which such abandoned funds were first presumed abandoned pursuant to the terms of the act.

Mr. William C. Brown

It thus appears from this legislation that the General Assembly has clearly expressed the intent that the reports required under subsection 1 of Section 362.390 would be made in September, 1978, and on or before the tenth day thereof and in every seventh year thereafter. Clearly since the act is not effective until August 13th, the requirement of subsection 2 of Section 362.395 that the company mail statements to apparent owners on or before the first day of August cannot be strictly complied with for the year 1978. Clearly also the actions required to be taken after such date, except for the reports required under subsection 1 of Section 362.390 and the filing of the affidavit of publication under subsection 1 of Section 362.395, are to be taken within the specified periods of time relating back to the initial date on which the funds are presumed to be abandoned.

Your question is what effect the apparent inadvertent use of the August 1 date has on the act and the obvious legislative intent that the reports commence in September of 1978. It is axiomatic that the primary purpose of statutory construction is to determine legislative intent. Here the legislative intent is clear and the only question that remains is what procedures should be followed in order to achieve the legislative purpose.

Clearly the act is not invalid because of the expression of the August 1 date and we see no reason to delay the implementation of the act contrary to the clear expression of legislative intent.

The argument seems to exist that the reference to the August 1 date is mandatory and therefore, the legislative intent cannot be carried out. However, in this respect we note the holding of the St. Louis Court of Appeals in Elliott v. Hogan, 315 S.W.2d 840 (1958) at l.c. 846:

" . . . The terms 'mandatory' and 'directory' are convenient only for the purpose of distinguishing one class of irregularities from another, for, strictly speaking, all laws are mandatory in the sense that they are enacted to be observed and obeyed. However, adopting, for convenience, the nomenclature heretofore commonly used, it is true that in many decisions involving our election laws a distinction has been drawn between the result which followed from the violation of a statute held to be mandatory and the consequence of a breach of a statute said to be merely directory in nature. (citations omitted)

Mr. William C. Brown

"But whether a statute is mandatory or merely directory is not always clear. It has been said that if the statute in question prescribes the result to follow from its violation, the courts will consider the provision a mandatory requirement, and enforce it. . . ."

In the instant case it is clear that the object of the bill is to provide a method of procedure for the escheat of certain funds to the State of Missouri. It is hardly conceivable that the statutory reference to the August 1 date could be held mandatory so as to defeat such procedure. If such were true voluntary noncompliance by such companies with respect to such date would adversely affect the State of Missouri. However, we believe that while the statute is mandatory insofar as it concerns the obligation of such companies under the act it is not mandatory in the sense that a breach thereof on the part of such companies would adversely affect the right of the State to take such action as is necessary for compliance. We believe that a court of this state would fill in such a void in statutory language with respect to such date in order to give effect to the legislative intent.


We therefore are of the view that the procedure required to be followed by such companies for the mailing of such notice should be followed promptly after this act becomes effective and completed as expeditiously as possible. After this year such companies are expected to give the required notice on or before the first day of August.

CONCLUSION

It is the opinion of this office that notices which are required to be mailed by financial institutions under S.C.S.H. C.S.H.B. 896 & 897, Second Regular Session, 79th General Assembly, effective August 13, 1978, relating to unclaimed property, should be mailed promptly after August 13, 1978, and, thereafter, on or before the first day of August as provided in such act.

The foregoing opinion which I hereby approve was prepared by my assistants, John C. Klaffenbach and Terry Allen.

Very truly yours,


JOHN ASHCROFT
Attorney General



JOHN ASHCROFT
ATTORNEY GENERAL

Attorney General of Missouri

JEFFERSON CITY

65101

July 21, 1978

(314) 751-3321

OPINION LETTER NO. 139

Honorable Thomas A. Villa
Representative, District 103
6136 Arendes
St. Louis, Missouri 63116

Dear Representative Villa;

This letter is in response to your questions asking as follows:

- "A. Does the title to Senate Bill 703 (commonly known as the Harris-Stowe Bill), as it relates to Section 6 of that Bill, comply with the requirement of Article III, Section 23 of the Missouri Constitution that: 'No bill shall contain more than one subject matter which shall be clearly expressed in its title. . . .'
- "B. Does Subsection 1 of Section 6 of Senate Bill 703 amend the provisions of Sections 169.410 to 169.540, R.S.Mo. to the extent such subsection is in conflict therewith? If not, do the provisions of Senate Bill 703 or Sections 169.410 to 169.540, R.S.Mo., control when there is conflict between them?
- "C. Where Subsection 1 of Section 6 of Senate Bill 703 refers to 'persons employed by Harris-Stowe College prior to September 1, 1978', does such reference include only those persons employed prior to September 1, 1978 by the Board of Regents of Harris-Stowe College duly appointed, qualified and acting pursuant to Section 2 of the

Honorable Thomas A. Villa

Bill, or does it also include those persons employed by the Board of Education of the City of St. Louis who are assigned to Harris-Stowe College during the transition period provided for in Section 3 of the Bill, but not technically employed by the Board of Regents until after September 1, 1978."

You also state:

"Harris-Stowe College is and for many years has been owned, managed and controlled by the Board of Education of the City of St. Louis as a city teacher training school pursuant to Section 178.410, R.S.Mo. The college receives state aid under §163.171.

"Senate Bill 703 (commonly known as the Harris-Stowe Bill) which was recently enacted by the Missouri legislature and signed by Governor Teasdale, provides for the transfer of ownership, management and control of the college to a Board of Regents to be appointed by the Governor prior to October 17, 1978. The Board of Regents will thereafter assume ownership, management and control of the college. Its operations will be funded by the State of Missouri. A complete copy of the Bill is attached to this request.

"Section 6 of the Harris-Stowe Bill directs that any persons, employed by the college prior to September 1, 1978 who are members of the Public School Retirement System of the City of St. Louis will thereafter remain members of that system, and any required employer contributions for such persons will be made by the State of Missouri. Persons employed after September 1, 1978 will become members of the appropriate state retirement system.

"Under Sections 169.410 to 169.540, R.S.Mo., the Board of Trustees of the Public School Retirement System of the City of St. Louis is responsible for the administration of that system.

Honorable Thomas A. Villa

"The Board of Trustees has been advised by the Board of Education of the City of St. Louis that persons currently employed at the college will be allowed either to remain at the college or to transfer to another public school under the management and control of the Board of Education of the City of St. Louis. In making this decision, the right to continued membership in the Public School Retirement System of the City of St. Louis is expected to be a significant consideration, particularly in the case of non-professional employees who would not qualify for membership in the state public school retirement system.

"The Board of Trustees of the Public School Retirement System of the City of St. Louis is unable to give reasonable assurance to its members who work at Harris-Stowe College regarding the right to remain members of the system because of (a) possible constitutional deficiencies in the title of S.B. 703, (b) conflicts between Subsection 1 of Section 6 of the Bill and Sections 169.410 to 169.540, R.S.Mo., and (c) an ambiguity in the Bill concerning the employment relationship with the College prior to September 1, 1978 necessary to allow continued membership in the Public School Retirement System of the City of St. Louis.

"Examples of the conflicts between Subsection 1 of Section 6 of the Harris-Stowe Bill and Sections 169.410 and 169.540, R.S.Mo. include the definitions of employee, public school, school district and teacher under Section 169.410, R.S.Mo. Furthermore, Section 169.540, R.S.Mo. is totally repugnant to the Harris-Stowe Bill in that it provides that the State of Missouri shall contribute no funds to the retirement system except as part of a general apportionment of school moneys throughout the state.

"The Board of Trustees is informed that during the period of transition as provided in Section 3 of the Bill, all of the persons who work at Harris-Stowe College may continue to be employed by the Board of Education of the City of St. Louis and assigned to Harris-Stowe College. Substantially

Honorable Thomas A. Villa

all personnel and other costs incurred in management and operation of the College will be reimbursed by the state. Hence, persons who work at the College may not be employed by the Board of Regents until after September 1, 1978. Subsection 1 of Section 6 of the Bill does not clearly state that such employees shall remain members of the Public School Retirement System of the City of St. Louis."

In view of the time element involved we will eliminate unnecessary discussion and attempt to answer your questions as briefly as possible.

Your first question asks whether the title to Senate Bill No. 703, Second Regular Session, 79th General Assembly, effective August 13, 1978, complies with the requirements of Section 23 of Article III of the Missouri Constitution and contains not more than one subject matter which is clearly expressed in its title. It should be clear that this office does not have the authority to declare a legislative enactment unconstitutional. Gershman Investment Corp. v. Danforth, 517 S.W.2d 33 (Mo.Banc 1974). However, in any event, it is our view that the Missouri courts would not declare the title of Senate Bill No. 703 to be in violation of Section 23 of Article III. We are of this view because the title is a general one in that it relates to city teacher training schools and also because the presumption of constitutionality is strong. The courts have stated that such section is to be reasonably and liberally interpreted. It does not forbid the inclusion in one bill, under one general title of subjects naturally and reasonably related to each other. See V.A.M.S. Annot., Section 23, Article III.

Your second question asks whether subsection 1 of Section 6 of Senate Bill No. 703 controls over contrary provisions of Sections 169.410 to 169.540. You also note that the latter sections have been amended in part and reenacted by Senate Bill No. 542, Second Regular Session, 79th General Assembly. Such amendments have been approved by the Governor. However, Section 169.450, RSMo, which is the prohibition against the State of Missouri contributing funds directly or indirectly to finance the plan to pay retirement allowances by appropriation bills or otherwise, except those funds which the district may receive from time to time under a law or laws providing for a general apportionment of school moneys throughout the state, was not amended by Senate Bill No. 542. In any event, the rule of law is clear that special statutes usually prevail over general statutes in case of repugnancy. State ex rel. Missouri State Life Ins. Co. v. Gehner, 8 S.W.2d 1068 (Mo.Banc 1928). Therefore, in answer

Honorable Thomas A. Villa

to your second question, if there is any repugnancy between the general sections and Senate Bill No. 703, the latter will prevail consistent with the legislative intent.

Your final question asks whether the reference in Section 6 of Senate Bill No. 703, which refers to "persons employed by Harris-Stowe College prior to September 1, 1978", includes persons employed prior to such date by the Board of Regents of Harris-Stowe College appointed under Section 2 of the act or whether it also includes those persons employed by the Board of Education of the City of St. Louis who are assigned to Harris-Stowe College.

Perhaps some lack of clarity may have resulted in this legislation because of the fact that Section 6 of the act was added to the bill after it was introduced.

Section 6 provides:

"1. Any person employed by Harris-Stowe College prior to September 1, 1978, who is a member of the public school retirement system established in sections 169.410 to 169.540, RSMo, shall remain a member of that system. Any employer contributions required to be made by sections 169.410 to 169.540, RSMo, shall be made by the state of Missouri.

"2. Any person employed on or after September 1, 1978, as an instructor, teacher or administrator of Harris-Stowe College is a member of the public school retirement system of Missouri created by sections 169.010 to 169.130, RSMo. Any other person employed on or after September 1, 1978, as any employee of Harris-Stowe College is a member of the Missouri state employees' retirement system established by sections 104.310 to 104.550, RSMo."

It is clear that under Section 2 of the act the Governor has until October 17, 1978 to appoint, with the advice and consent of the Senate, a six-member board of regents to control Harris-Stowe College. Also under Section 3 of the act the transition period terminates no later than July 1, 1979, at which time the board of regents shall be responsible for every aspect of the college's operation. Under Section 5 of the act the state is required, effective July 1, 1978, to provide the necessary funds to fully staff and operate the college and make appropriate capital

Honorable Thomas A. Villa

improvements. Considering these dates it seems obvious that the board of regents appointed by the Governor with the Senate's consent conceivably could not take control of the College until after the date of September 1, 1978, had passed. We believe that in interpreting Section 6, it is of no consequence as to whether the person employed "prior to September 1, 1978" was employed by the Board of Regents of the College or by the St. Louis Board of Education at the College prior to the assumption of control of the College by the Board of Regents.

Very truly yours,

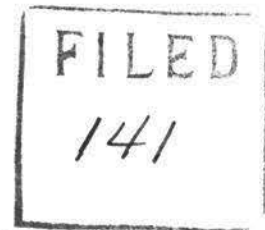
A handwritten signature in cursive script that reads "John Ashcroft". The signature is written in dark ink and is positioned above the printed name and title.

JOHN ASHCROFT
Attorney General

September 27, 1978

OPINION LETTER NO. 141
Answer by Letter - Covington

Dr. William R. Goodge, Secretary
Missouri State Anatomical Board
Department of Anatomy
University of Missouri Medical Center
Columbia, Missouri 65212



Dear Dr. Goodge:

This is in response to your request for an opinion on the question of whether the Missouri State Anatomical Board can transfer the 1978 balance of funds in its possession to the Department of Higher Education for deposit in the state treasury.

Attorney General's Opinion No. 10, April 7, 1977, concluded that the legislature, by providing for a Type II transfer in the Omnibus State Reorganization Act of 1974, intended to subject the fiscal operations of the Anatomical Board to supervision of one of the executive departments of state government, in this case the Coordinating Board for Higher Education through the Department of Higher Education. A copy of Opinion No. 10, April 7, 1977, is enclosed.

Section 33.080, RSMo 1969, provides:

"All fees, funds and moneys from whatsoever source received by any department, board, bureau, commission, institution, official or agency of the state government by virtue of any law or rule or regulation made in accordance with any

law, shall, by the official authorized to receive same, and at stated intervals of not more than thirty days, be placed in the state treasury to the credit of the particular purpose or fund for which collected, and shall be subject to appropriation by the general assembly for the particular purpose or fund for which collected during the biennium in which collected and appropriated. The unexpended balance remaining in all such funds (except such unexpended balance as may remain in any fund authorized, collected and expended by virtue of the provisions of the constitution of this state) shall at the end of the biennium and after all warrants on same have been discharged and the appropriation thereof has lapsed, be transferred and placed to the credit of the ordinary revenue fund of the state by the state treasurer. Any official or any person who shall willfully fail to comply with any of the provisions of this section, and any person who shall willfully violate any provision hereof, shall be deemed guilty of a misdemeanor; provided, that all such money received by the curators of the university of Missouri except those funds required by law or by instrument granting the same to be paid into the seminary fund of the state, is excepted herefrom, and in the case of other state educational institutions there is excepted herefrom, gifts or trust funds from whatever source; appropriations; gifts or grants from the federal government, private organizations and individuals; funds for or from student activities; farm or housing activities; and other funds from which the whole or some part thereof may be liable to be repaid to the person contributing the same; and hospital fees. All of the above excepted funds shall be reported in detail quarterly to the governor and biennially to the general assembly."

Section 33.080 states that fees, funds and moneys from whatsoever source received shall be placed in the state treasury and that the unexpended balance remaining in all such funds at the end of the biennium shall be transferred and placed to the credit of the ordinary revenue fund of the state by the state treasurer (with certain exceptions not applicable hereto).

Dr. William R. Goodge

It is our view that, in view of Section 33.080, RSMo 1969, the Type II transfer effected by the Omnibus State Reorganization Act and Opinion No. 10, 1977, any unexpended balances of funds of the Anatomical Board at the end of the biennium must be transferred to the Department of Higher Education for deposit in the state treasury.

Very truly yours,

JOHN ASHCROFT
Attorney General

Enclosure:
Op. No. 10, 4-7-77



JOHN ASHCROFT
ATTORNEY GENERAL

Attorney General of Missouri

JEFFERSON CITY

65101

July 25, 1978

(314) 751-3321

OPINION LETTER NO. 143
(Amended August 2, 1978)

Honorable Meredith Ratcliff
Prosecuting Attorney
Adair County
P. O. Box 422
Kirksville, Missouri 63501

Dear Mr. Ratcliff:

This is in answer to your recent opinion request reading as follows:

"Senate Bill No. 779, 79th General Assembly provides for additional duties and compensation for county assessors:

"53.075. Each county assessor in all counties except counties of the first class with or without a charter form of government shall, in addition to all other duties provided by law, place identification numbers, letters or names of all school districts and other political subdivisions authorized by law to levy a tax in proper columns provided therefor on the land list and personal property list.

"53.076. As compensation for the extra duties imposed by section 53.075, each county assessor shall receive, in addition to all other compensation provided by law, the sum of three thousand six hundred dollars annually paid in equal monthly installments out of the county treasury at the same time and in the same manner as the other compensation for county assessors.

"The county assessor has the land list and personal property list to the County Clerk by the 1st day of June of each year.

Honorable Meredith Ratcliff

"QUESTION OF LAW: Under Senate Bill No. 779, 79th General Assembly can the County Assessor be paid for 1978 when he in fact should have turned the lists over prior to the effective date of said Senate Bill?

"QUESTION OF LAW: If the County Assessor in fact did not perform the additional duties set forth in Senate Bill No. 779 can he be paid for 1978?"

Senate Bill No. 779 of the 79th General Assembly, to which you refer and which will become effective August 13, 1978, provides in part as follows:

"Section 1. Chapters 53 and 65, RSMo, are amended by inserting therein four new sections to be known as sections 53.075, 53.076, 65.246, and 65.247, to read as follows:

"53.075. Each county assessor in all counties except counties of the first class with or without a charter form of government shall, in addition to all other duties provided by law, place identification numbers, letters or names of all school districts and other political subdivisions authorized by law to levy a tax in proper columns provided therefor on the land list and personal property list.

"53.076. As compensation for the extra duties imposed by section 53.075, each county assessor shall receive, in addition to all other compensation provided by law, the sum of three thousand six hundred dollars annually paid in equal monthly installments out of the county treasury at the same time and in the same manner as the other compensation for county assessors."

We believe that the answer to your question is found in the enclosed Opinion No. 41, rendered February 2, 1972, to A. J. Seier.

The above opinion holds that where an increase in compensation is provided for the performance of duties by county officials, such increased compensation cannot be paid during the initial year in which it is impossible for the county officials to perform such services.

Honorable Meredith Ratcliff

Section 137.245, RSMo Supp. 1976, provides in part as follows:

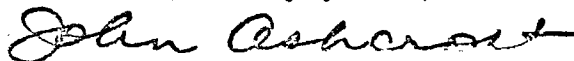
"1. The assessor, except in St. Louis city, shall make out and return to the county governing body, on or before the thirty-first day of May in every year, the assessor's book, verified by his affidavit annexed thereto, in the following words:

" being duly sworn, makes oath and says that he has made diligent efforts to ascertain all the taxable property being or situate, on the first day of January last past, in the county of which he is assessor; that, so far as he has been able to ascertain the same, it is correctly set forth in the foregoing book, in the manner and the value thereof stated therein, according to the mode required by law."

Under the provisions of such section, the assessors in second, third and fourth class counties are required to complete the assessor's book and return to the county governing body such book on or before May 31 of each year. It is obvious that on August 13, 1978, the effective date of Senate Bill No. 779, the time will have long passed when the county assessor could have performed the duty required by Senate Bill No. 779 for the year 1978.

However, assessors' terms commence on the first day of September next after their election under Section 53.010, RSMo. Therefore it is our view that such assessors are entitled to such additional compensation beginning with the monthly installment for September, 1978.

Very truly yours,



JOHN ASHCROFT
Attorney General

Enclosure: Op. No. 41,
2/2/72, Seier

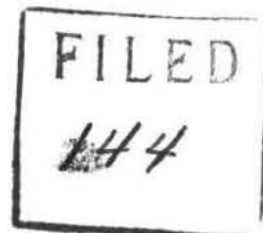
CITIES, TOWNS & VILLAGES:
CHARTER CITIES:
AMBULANCES:

Ambulances owned and operated by a constitutional charter city and licensed by the state under §§ 190.100-190.190, RSMo Supp. 1975, must be insured as required by § 190.120, RSMo Supp. 1975 and 13 CSR 50-40.030 and the city may not self-insure to meet this requirement.

OPINION NO. 144

September 7, 1978

Honorable Carl Muckler
Representative, 56th District
1820 Arundel Drive
Florissant, Missouri 63033



Dear Representative Muckler:

This is in response to your request for an official opinion of this office on the following question:

"Can a Charter City self-insure its ambulance vehicles via the power granted Charter Cities under Article VI, Section 19, 19(a), and 22 without being in conflict with 190.120 RSMo. and 13 CSR 50-40.030?"

Section 190.120, RSMo Supp. 1975, a part of the 1973 law providing for the state licensing of ambulance services and personnel, reads:

"1. No ambulance license shall be issued under sections 190.100 to 190.195, nor shall such license be valid after issuance, nor shall any ambulance be operated in Missouri unless there is at all times in force and effect insurance coverage for each and every ambulance owned or operated by or for the applicant or licensee, providing for the payment of damages in an amount as prescribed by the board issued by an insurance company licensed to do business in the state of Missouri:

(1) For injury to or death of individuals in accidents resulting from any cause for

Honorable Carl Muckler

which the owner of said vehicle would be liable on account of liability imposed on him by law, regardless of whether the ambulance was being driven by the owner or his agent; and

(2) For the loss of or damage to the property of another, including personal property, under like circumstances.

"2. The insurance policy shall be submitted by all licensees required to provide such insurance under sections 190.100 to 190.195. The insurance policy shall be submitted to the license officer, in such form as he may specify, for his approval prior to the issuance of each ambulance license.

"3. Every insurance policy required by the provisions of this section shall contain a provision for a continuing liability thereunder to the full amount thereof, notwithstanding any recovery thereon; that the liability of the insurer shall not be affected by the insolvency or the bankruptcy of the assured; and that until the policy is revoked the insurance company will not be relieved from liability on account of nonpayment of premium, failure to renew license at the end of the year, or any act or omission of the named assured. Such policy of insurance shall be further conditioned for the payment of any judgments up to the limits of said policy, recovered against any person other than the owner, his agent or employee, who may operate the same with the consent of the owner.

"4. Every insurance policy required by the provisions of this section shall extend for the period to be covered by the license applied for and the insurer shall be obligated to give not less than thirty days' written notice to the license officer and to the insured before any cancellation or termination thereof earlier than its expiration date, and the cancellation or other termination of any such policy shall

Honorable Carl Muckler

automatically revoke and terminate the licenses issued for the ambulances covered by such policy unless covered by another insurance policy in compliance with sections 190.100 to 190.195."

13 CSR 50-40.030 provides:

"Each licensed ambulance shall be insured for the sum of at least \$100,000 for injury to or death of any one individual arising out of any one accident and the sum of at least \$300,000 for injury to or death of more than one individual in any one accident and for the sum of at least \$10,000 for damage to property arising from any one accident."

We understand that the City of St. Louis has by ordinance provided for the self-insurance of all municipally owned motor vehicles. The city's charter does not specifically address the subject of insurance for the city or its property. The city has been heretofore licensed by the State Division of Health to operate an ambulance service but on a self-insured basis.

Ambulances owned or operated by political subdivisions of the state are subject to the 1973 law and must be licensed thereunder. City of Raytown v. Danforth, 560 S.W.2d 846 (Mo.Banc 1977).

Section 190.120 plainly does not authorize licensed ambulance operators to self-insure their risk of liability. By comparison see Section 303.220, RSMo.

"It would be a contortion of the term insurance to hold that its meaning as employed here is broad enough to include 'self-insurance' which while commonly referred to in that fashion is actually the antithesis of insurance as that term is commonly used." Universal Underwriter Insurance v. Mariett Homes, Inc., 238 S.2d 730, 732 (Ala. 1970).

Accordingly, it must be determined whether the legislature can validly impose an obligation upon constitutional charter cities, particularly the City of St. Louis, to insure, rather than self-insure, the risk of liability associated with their licensed ambulance operation.

Honorable Carl Muckler

The Missouri Constitution provides in material part:

" . . . Any city . . . may frame and adopt a charter for its own government.

* * *

" . . . Any city which . . . has adopted a charter for its own government, shall have all powers which the general assembly . . . has authority to confer upon any city, provided such powers are consistent with the constitution of this state and are not limited or denied either by the charter so adopted or by statute. . . ."
Art. VI, §§ 19, 19(a) (Emphasis added).

" . . . The city of St. Louis . . . shall continue for city purposes with its present charter . . . and with the powers, organization, rights and privileges permitted by this Constitution or by law." Art. VI, § 31.

" . . . No law shall be enacted creating or fixing the powers, duties or compensation of any municipal office or employment, for any city framing or adopting its own charter under this or any previous Constitution, . . ."
Art. VI, § 22.

Although the City of St. Louis undoubtedly has the power to operate an ambulance service, we think its power to do so has been "limited . . . by statute", specifically Sections 190.100-190.190, RSMo Supp. 1975, and that included in the limitation is the requirement that each ambulance be insured, rather than self-insured, in the amount prescribed by state regulation. Furthermore, we do not believe that this state law requirement of ambulance insurance can be regarded as "creating or fixing the powers, duties or compensation of any municipal office or employment." It is comparable to a state law requiring municipal bodies to conduct meetings open to the public, or a state law requiring nondiscriminatory practices in municipal employment, both of which laws having been held valid under Art. VI, § 22. Cohen v. Poelker, 520 S.W.2d 50 (Mo. Banc 1975); City of St. Louis v. Missouri Commission on Human Rights, 517 S.W.2d 65 (Mo. 1974).

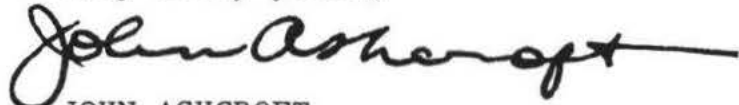
Honorable Carl Muckler

CONCLUSION

It is the opinion of this office that ambulances owned and operated by a constitutional charter city and licensed by the state under §§ 190.100-190.190, RSMo Supp. 1975, must be insured as required by § 190.120, RSMo Supp. 1975 and 13 CSR 50-40.030 and the city may not self-insure to meet this requirement.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Lauren R. Wood.

Very truly yours,

A handwritten signature in black ink, appearing to read "John Ashcroft", with a long horizontal flourish extending to the right.

JOHN ASHCROFT
Attorney General

July 31, 1978

OPINION LETTER NO. 146
Answer by Letter - Morris

Honorable John G. Meyer
Prosecuting Attorney
Perry County
17 North Main Street
Perryville, Missouri 63775



Dear Mr. Meyer:

This letter is in response to your question asking whether the game you describe is prohibited under Missouri law. You state as follows:

"The following game is desired to be played by a local not-for-profit organization; for a consideration a contestant receives a card with various squares identified with letters and numbers, said card being similar to a bingo card. When five squares are covered either horizontally, vertically or diagonally, the contestant qualifies to win a prize.

"To win the prize the contestant has three chances in which to put a dart within a four inch circle (women, six inch circle) from ten feet away. If the contestant cannot put the dart within the circle within three tries, no prize is awarded and no consolation prize is given. If the contestant is successful, the contestant wins a prize."

Honorable John G. Meyer

Section 563.430, RSMo 1969, prohibits the making, establishment, or advertising of "any lottery, gift enterprise, policy or scheme of drawing in the nature of a lottery . . ." ¹Lotteries are also proscribed under the provisions of Article III, § 39(9) of the Missouri Constitution. As has long been recognized by the Missouri courts, such an illegal lottery contains three essential elements; (1) consideration from the participants, (2) a prize to be awarded, and (3) an element of chance in the outcome. Mobil Oil Corporation v. Danforth, 455 S.W.2d 505, 507 (Mo. banc 1970); State ex Inf. McKittrick v. Globe-Democrat Pub. Co., 110 S.W.2d 705, 713 (Mo. banc 1937); State v. Emerson, 1 S.W.2d 109, 111 (Mo. 1927). Since it is not disputed that the first two elements are present in the above-described game, the sole issue herein is whether the contest at issue is sufficiently a game of chance to satisfy the third requirement of an illegal lottery.

It is clear that, had only the first part of the above-mentioned contest been present (making the game essentially one of bingo), the requisite element of chance would unquestionably be present. See Attorney General's Opinion No. 70, Phillips, 3-17-55 (enclosed). Thus, the only remaining question is whether the additional requirement, that the contestants winning the "bingo" portion of the competition hit a target with a dart, in some manner vitiates the chance factor. We conclude that it does not. Even if it is assumed that throwing a dart at a target of the designated size and distance is primarily a matter of skill rather than chance, ²this clearly does not supplant the operation of chance as the dominant element in the game. As stated in State ex Inf. McKittrick v. Globe-Democrat Pub. Co., *supra*, "a contest may be a lottery even though skill, judgment, or research entered thereinto in some degree, if chance in a large degree determine[s] the result" (emphasis supplied). *Id.*, at 713. Implicit in the game at issue herein is that the vast majority of

1. A similar provision is also contained in the new Missouri Criminal Code. See §§ 572.010 - 572.120, RSMo 1977 Supp. (eff. 1-1-79).

2. In view of the conclusion of this opinion, we do not find it necessary to pass upon the question of whether the dart game, standing alone, would be primarily a contest of skill or chance.

Honorable John G. Meyer

contestants are eliminated by the operation of pure chance in the "bingo" portion of the contest, before the purported skill factor ever comes into play. That being the case, it is clear that chance is by far the larger factor in determining the winner of the game,³ and that this contest therefore comes under the prohibition of lotteries in § 563.430.

This conclusion is strongly supported by past opinions of this office presenting analogous facts. In Attorney General's Opinion No. 65, Meyers, 10-21-57 (enclosed), for example, we held a contest in which participants wrote an essay on why they liked the sponsor's product in fifty words or less to be a lottery, for the reason that no criteria were specified for evaluating the essays, thus making the determination of the winners a matter of the individual bias and caprice of the judges. Similarly, a contest to guess the scores of twelve designated basketball games has been found to be a matter of chance where nine of the games were not local to the region where the contest was held, and further in view of the difficulty and uncertainty of predictions of the outcome of athletic events. Attorney General's Opinion No. 14, Cable, 4-14-60 (enclosed). See also State ex Inf. McKittrick v. Globe-Democrat Pub. Co., supra. An examination of the facts presented in these opinions and decisions clearly indicates that the chance factor present herein is more than sufficient to support the conclusion that the contest at issue is prohibited by the Missouri lottery statute.

3. As you note in your opinion request, identical facts to those herein were presented in People v. Settles, 78 P.2d 274, decided by the Appellate Department, Superior Court, Los Angeles County, California (1938). The California Court held that the question of whether skill or chance was the dominant element of the game was a question for a jury to decide. The court did not rule that skill is a dominant element of the game. However, it is our view that the courts of Missouri would not follow such reasoning but that the reasoning of the Missouri courts in State ex Inf. McKittrick v. Globe-Democrat Pub. Co., supra, and many other cases compel the holding that the game herein being ruled on is one in which chance is the dominant element and is therefore a lottery.

Honorable John G. Meyer

Therefore, it is our view that the above-described game constitutes an illegal lottery under the provisions of § 563.430, RSMo 1969.

Very truly yours,

JOHN ASHCROFT
Attorney General

Enclosures: Op. No. 70,
3-17-55, Phillips

Op. No. 65,
10-21-57, Myers

Op. No. 14,
4-14-60, Cable



JOHN ASHCROFT
ATTORNEY GENERAL

Attorney General of Missouri

JEFFERSON CITY

65101

(314) 751-3321

September 6, 1978

OPINION LETTER NO. 150

Honorable John E. Casey
Prosecuting Attorney
Linn County
116 North Main Street
Brookfield, Missouri 64628

Dear Mr. Casey:

This letter is in response to your letter asking:

"Can a Trustee of a special road district which has been dissolved, and who has levied and collected a tax when there was already sufficient funds in the account to pay off the bonds which were due two years in the future, return to each taxpayer the amount of money that was paid by that taxpayer for taxes for the year of the levy that was not necessary?"

You also state:

"A special road district was formed which encompassed one-half of Jackson Township in Linn County, Missouri. Bonds were issued and after operating a number of years, the district was dissolved two or three years ago. The bonds have still not been paid off and are not due until 1978 or 1979, and therefore, the County Court appointed a trustee. Inadvertently, the trustee, for the tax year 1977, levied taxes. There were, prior to 1977, sufficient funds derived from the income of the bonds to pay off the bonds and therefore it was not necessary that this tax be levied. Some of the taxpayers in the special road district, which composes one-half of the township, want the money returned to them.

Honorable John E. Casey

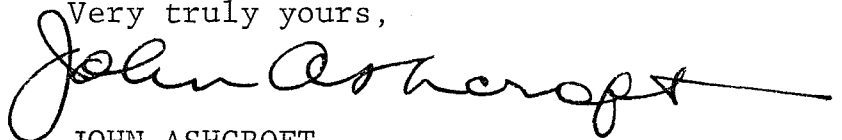
"Section 233.445 RSMo. 1969 provides as follows:

'When the Trustee shall have closed the affairs of the road district, and shall have paid all debts due by said road district, he shall pay over to the county treasurer all money remaining in his hands, and take receipt therefor, and deliver to the clerk of such county court all books, papers, records and deeds belonging to the dissolved road district.'

"It is anticipated that the road district bonds will be paid off within the next two years and the affairs of the district can be wound up. There appears to be no objection to any excess funds being paid over to the County Court pursuant to that statute but the question revolves around the one particular year, 1977, when the taxes were levied and the funds derived from that levy that they wish to be returned to the taxpayers who paid the taxes."

We find no statutory provision authorizing the trustee to refund such taxes. It is therefore our view that no refund of such taxes can be made by the trustee.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John Ashcroft", with a long horizontal flourish extending to the right.

JOHN ASHCROFT
Attorney General

Attorney General of Missouri

JOHN ASHCROFT
ATTORNEY GENERAL

JEFFERSON CITY

65101

(314) 751-3321

September 11, 1978

OPINION LETTER NO. 152

Mrs. Carolyn Ashford, Director
Department of Natural Resources
1014 Madison Street
Jefferson City, Missouri 65101

Dear Mrs. Ashford:

This opinion letter is issued in response to your request to this office for an opinion dated August 16, 1978. In this request, you asked the following questions of law:

"Federal Pretreatment Regulations published under 40 C.F.R. Part 128 in the Federal Register, Volume 43, No. 123--Monday, June 26, 1978. Section 403.10(b)(1) requires that the State submit a statement by the State Attorney General indicating whether the State has adequate authority to conduct pretreatment program, as outlined in the Federal Regulation. A copy of the Federal Regulation is attached for reference."

The regulation referred to in your question is rather lengthy, however, the applicable legal authorities are contained in Section 403.10(f)(1) entitled "Legal Authority". That section indicates that the state must have at least the following authority to enable its Director to:

"(i) Incorporate POTW [Publicly Owned Treatment Works] Pretreatment Program conditions into permits issued to POTW's; require compliance by POTW's with these incorporated permit conditions; and require compliance by industrial Users with Pretreatment Standards.

"(ii) Ensure continuing compliance by POTW's with pretreatment conditions incorporated into the POTW Permit through review of monitoring reports submitted to the Director by the POTW in accordance with Section 403.12 and ensure continuing compliance by Industrial Users with Pretreatment Standards through the review of self-monitoring reports submitted to the POTW or to the director by the Industrial Users in accordance with Section 403.12.

"(iii) Carry out inspection, surveillance and monitoring procedures which will determine, independent of information supplied by the POTW, compliance or noncompliance by the POTW with pretreatment conditions incorporated into the POTW Permit; and carry out inspection, surveillance and monitoring procedures which will determine, independent of information supplied by the Industrial User, whether the Industrial User is in compliance with Pretreatment Standards.

"(iv) Seek civil and criminal penalties, and injunctive relief, for noncompliance by the POTW with pretreatment conditions incorporated into the POTW Permit and for noncompliance with Pretreatment Standards by Industrial Users as set forth in Section 403.8(f)(1)(vi). The Director shall have authority to seek judicial relief for noncompliance by Industrial Users even when the POTW has acted to seek relief (e.g., if the POTW has sought a penalty which the Director finds to

be insufficient).

"[Comment: However, in most cases the Director's authority to seek judicial relief will be exercised where there is no POTW Pretreatment Program or where the POTW has failed to act.]

"(v) Approve and deny requests for approval of POTW Pretreatment Programs submitted by a POTW to the Director.

"(vi) Deny and recommend approval of (but not approve) requests for Fundamentally Different Factors variances submitted by Industrial Users in accordance with the criteria and procedures set forth in Section 403.13.

"(vii) Approve and deny requests for authority to modify categorical Pretreatment Standards to reflect removals achieved by the POTW in accordance with the criteria and procedures set forth in Sections 403.7, 403.9 and 403.11."

"Director" is defined in §403.2(e) of the federal regulations as the chief administrative officer of the state water pollution control agency. Section 204.136, RSMo (Supp. 1975) designates the Missouri Clean Water Commission as water pollution agency of the state.

It appears that the state does have the requisite authority.

The first inquiry concerns whether there is authority to enable the Director to:

"Incorporate POTW Pretreatment Program conditions into permits issued to POTW's; require compliance by POTW's with these incorporated permit conditions; and require compliance by Industrial Users with Pretreatment Standards."

Mrs. Carolyn Ashford
Page Four

Initially, it should be observed that any enforceable provision of any "pretreatment program" anticipated in this federal regulation is to be accomplished, as indicated in Sections 403.8 (c) and 403.10(f)(1) of that regulation, via conditions concerning pretreatment which would be adopted in the permit issued to the POTW (Publicly Owned Treatment Works). Therefore, the inquiry into (i) in this opinion deals primarily with the authority of the state through its Missouri Clean Water Law, to adopt and enforce permits with the types of conditions referred to in the federal regulation and which are discussed hereinafter.

The first section from the Clean Water Law which applies is Section 204.026(13). This concerns the authority to incorporate pretreatment program conditions into permits and provides that the Clean Water Commission has authority to issue permits to control, prevent or abate water pollution with such conditions which may be necessary to ensure compliance with pretreatment effluent standards, and all requirements as established by any Federal Water Pollution Control Act.

The authority to insert the necessary conditions into a permit is also found in Section 204.051.3 which provides that the permit ". . . shall issue . . . with such conditions as he deems necessary to ensure that the source will meet the requirements of . . . any federal water pollution control act as it applies to sources in this state."

This specific authority is buttressed by the provisions of Section 204.026(15) where the Clean Water Commission is granted all incidental powers necessary to ensure that the state complies with any Federal Water Pollution Control Act and retains maximum control thereunder. Thus there is authority to incorporate the necessary pretreatment conditions into the permits issued to the POTW's.

With regard to requiring compliance by POTW's with permit conditions, Section 204.051.1(3) of the Missouri Clean Water Law provides that it is unlawful for any person to violate permit provisions. POTW's must obtain permits to comply with Section 204.051.2, where it is provided that it is unlawful for any person to, inter alia, build, operate or use any water contaminant or point source in the state,

Mrs. Carolyn Ashford*
Page Five

which would include a publicly owned treatment works within its definition, without first obtaining a permit pursuant to the Clean Water Law.

Section 204.076 provides that the Clean Water Commission may institute litigation to enjoin or seek penalties for the violation of any of its permits.

With regard to the third part of this first inquiry, requiring compliance by industrial users with pretreatment standards, the Commission in Section 204.026(16) is authorized to adopt pretreatment regulations as required to ensure compliance with pretreatment effluent standards and all requirements established by any federal water pollution control act for point sources in the state. Pretreatment regulations are defined in Section 204.016(8) of the Missouri Clean Water Law as:

"[L]imitations on the introduction of pollutants or water contaminants into publicly owned treatment works or facilities which the commission determines are not susceptible to treatment by such works or facilities or which would interfere with their operations, . . ."

Authority to adopt pretreatment regulations is further spelled out in Section 204.041 where it is stated that:

"[T]he commission shall adopt . . . pretreatment . . . regulations which require the use of effective treatment facilities, or other methods . . . to limit or prevent introduction of water contaminants into publicly owned treatment works or facilities as required under any federal water pollution control act, . . ."

These pretreatment regulations, which by definition apply to anyone discharging into publicly owned treatment works, are

Mrs. Carolyn Ashford
Page Six

also subject to the provisions in Section 204.051.1(3) which makes it unlawful to violate any pretreatment regulation, and those in Section 204.076.1 which make it unlawful for any person to violate any regulation adopted by the Commission and further provide that such violation may be subject to injunctive relief and penalties up to \$10,000 per day for such violations.

Thus, there is authority to require compliance by industrial users with pretreatment standards.

With regard to the second inquiry in your question, authority to:

"(ii) Ensure continuing compliance by POTW's with pretreatment conditions incorporated in the POTW Permit through review of monitoring reports submitted to the Director by the POTW in accordance with Section 403.12 and ensure continuing compliance by Industrial Users with Pretreatment Standards through review of self-monitoring reports submitted to the POTW or to the director by the Industrial Users in accordance with Section 403.12",

the same authority with regard to enforcing and establishing pretreatment standards or conditions, whether by permit or regulation, would obviously apply.

Section 204.026(23) of the Missouri Clean Water Law authorizes the Commission to require persons either owning or engaged in operations which do or may introduce water contaminants or pollutants into publicly owned treatment works to conduct any monitoring necessary to establish and maintain records and file reports concerning certain specified items and also ". . . any other information required by any federal water pollution control act. . . ." That section further provides that:

"The commission shall develop and adopt such procedures for inspection, investigation, testing, sampling, monitoring and entry respecting water contaminant and point sources as may be required for approval of such a pro-

Mrs. Carolyn Ashford
Page Seven

gram under any federal water pollution control act;"

This section, 204.026(23), applies to the discharge of water contaminants from publicly owned treatment works as well as to operations which introduce water contaminants or pollutants into those publicly owned treatment works. Therefore, its provisions requiring monitoring and reporting apply both to the publicly owned treatment works and also to the industrial users discharging to those publicly owned treatment works.

Further, Section 204.051.12 provides that the publicly owned treatment works must notify the Clean Water Commission of any new introductions of water contaminants or pollutants into such works, changes in volume or character of such contaminants or pollutants, and of the quality and quantity of the effluents being introduced or to be introduced into the works and the impact of such introductions on the effluent to be released from the publicly owned treatment works.

Thus there is the requisite authority to satisfy this second inquiry.

The third area of concern within your question was whether there is authority to:

"Carry out inspection, surveillance and monitoring procedures which will determine, independent of information supplied by the POTW, compliance or noncompliance by the POTW with pretreatment conditions incorporated into the POTW Permit; and carry out inspection, surveillance and monitoring procedures which will determine, independent of information supplied by the Industrial User, whether the Industrial User is in compliance with Pretreatment Standards."

Mrs. Carolyn Ashford
Page Eight

It appears that adequate authority for this requirement is contained in Section 204.026(20) of the Missouri Clean Water Law wherein the Commission is given authority to enter either private or public property for any purpose required by any Federal Water Pollution Control Act or the Missouri Clean Water Law to investigate records which are required to be kept under that law, or any condition which the Commission has probable cause to believe to be a water contaminant source or the site of any suspected violation of any regulations, standards, limitations or permits issued under the Missouri Clean Water Law. By this section, the Commission then has the authority to look behind the records which must be kept in compliance with Section 204.026(23) referenced above.

Further authority for investigations is found in Section 204.056.1 where there is authority for investigation of alleged violations of any standards, limitations, regulations or permit conditions. Other authority is found in 204.026(5) wherein the Clean Water Commission is given authority to conduct studies or investigations relating to water pollution and its causes, prevention, control and abatement as may be necessary to discharge its duties under the Missouri Clean Water Law.

Therefore there is the authority necessary to satisfy this third inquiry.

The fourth area for discussion under your questions concerns whether the Director has authority to:

"Seek civil and criminal penalties, and injunctive relief, for noncompliance by the POTW with pretreatment conditions incorporated into the POTW Permit and for noncompliance with Pretreatment Standards by Industrial Users as set forth in Section 403.8(f)(1)(vi). The Director shall have authority to seek judicial relief for noncompliance by Industrial Users even

Mrs. Carolyn Ashford
Page Nine

when the POTW has acted to seek relief (e.g., if the POTW has sought a penalty which the Director finds to be insufficient)."

The answer to this inquiry incorporates the discussion above concerning the authority to issue permits with pretreatment conditions, adopt pretreatment regulations and effluent regulations, and to enforce them. Section 204.076, providing criminal and civil penalties and injunctive relief, addresses violations of all regulations passed by the Clean Water Commission, whether pretreatment or effluent regulations, and also permit conditions. Therefore, penalties and injunctive relief are available where violations of the permit conditions of a POTW permit or effluent regulations are involved, and also where violations of the pretreatment regulations by the industrial users discharging to POTW's are concerned. There is no indication in the Clean Water Law or elsewhere in the Missouri statutes that the state would be preempted from pursuing criminal or civil penalties or injunctive relief by any action filed by a POTW. Therefore, the Director would have authority to pursue further judicial relief even though a POTW may have already attempted to seek judicial relief. Any discussion of the authority of the POTW's to seek such judicial relief is, of course, beyond the scope of this opinion.

The fifth area for consideration within your question concerns whether the Director has authority to:

"Approve and deny requests for approval of POTW Pretreatment Programs submitted by a POTW to the Director."

The POTW pretreatment program is a unique creature of the federal regulations. It seems clear that, since those regulations also call on the states to perform this general function, the authority for such activity would be contained in Section 204.026(3) which provides that the Clean Water Commission will have authority to:

Mrs. Carolyn Ashford
Page Ten

Advise, consult, and cooperate with other agencies of the state, the federal government, other states and interstate agencies, and with affected groups, political subdivisions and industries in furtherance of the purposes of sections 204.006 to 204.141. [The Clean Water Law]"

Under Section 204.136, the Commission is designated as ". . . the water pollution agency of the state for all purposes of any Federal Water Pollution Control Act" and may:

"(1) Take all necessary or appropriate action to obtain for the state the benefits of any federal act, or to obtain federal approval of any state water pollution control program;

* * *

"(4) Participate through its authorized representatives in proceedings under any federal act;"

Section 403.8(c) of the Federal Regulations provides that the pretreatment program conditions are to be incorporated within permit conditions. The authority for the Missouri Clean Water Commission to include such conditions in permits is discussed at some length above. Therefore, since the Commission has authority to incorporate pretreatment conditions in its permits, where state powers are concerned there is clearly authority for it to approve or deny the program as it is incorporated in the permit conditions. Where federal powers are involved, the Clean Water Commission action to approve or deny a program for a federal agency, based on federal regulations, is at the request of the federal agency which adopted these regulations. This is authorized from the state's standpoint by the statutes cited above authorizing the Commission to work with the federal government and its agencies.

This authority for disapproval or denial is reinforced by the provisions of 204.026(15) concerning incidental powers necessary to assure that the State of Missouri complies with any

Mrs. Carolyn Ashford
Page Eleven

Federal Water Pollution Control Act. There is the authority to satisfy the fifth inquiry.

The sixth inquiry involved in your question concerns whether the Director has authority to:

"(vi) Deny and recommend approval of (but not approve) requests for Fundamentally Different Factors variances submitted by Industrial Users in accordance with the criteria and procedures set forth in Section 403(13)."

This procedure for a variance is explained in Section 403.13 (c) of the Federal Regulations. It is a variance from categorical pretreatment standards set by the Environmental Protection Agency to specify quantities or concentrations of pollutants, to be established by separate federal regulations, which may be introduced into a POTW by existing or new industrial users. These variances are to be granted from federally established pretreatment standards if the factors considered by EPA in establishing the pretreatment standard were fundamentally different from those relating to the industrial user requesting a variance.

Just as noted with the inquiry immediately above, this involves variances created by the Federal Regulations. The Commission would be acting upon the request of the federal agency which adopted the regulation providing for the variances. Denial of any variance request would not affect the status quo of any industrial user with respect to the Missouri Clean Water Law, but only as to federal regulations. Approval would be nothing more than a recommendation. Therefore, authority for such denial or recommended approval can be found under the sections discussed above providing authority for the Clean Water Commission to cooperate and work with federal agencies and take actions necessary to meet the requirements of the Federal Water Pollution Control Act.

With respect to the requirements of the Missouri law, the Missouri Clean Water Commission has been granted specific authority to grant individual variances in Section 204.061. The variances referred to there are from the requirements of the Missouri Clean Water Law, while those referred to in the Federal Regulation

Mrs. Carolyn Ashford
Page Twelve

are requirements of the Federal law and regulations. However, the concept of approving or denying variances is a recognized power of the Missouri Clean Water Commission and it has the authority to grant variances from requirement of the Missouri law.

The final area of concern in your question is whether the Director has authority to:

"Approve and deny requests for authority to modify categorical Pretreatment Standards to reflect removals achieved by the POTW in accordance with the criteria and procedures set forth in Sections 403.7, 403.9 and 403.11."

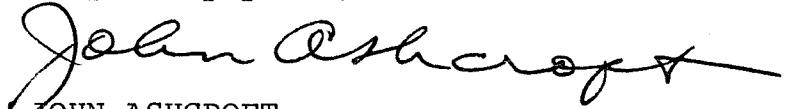
Once again, the authority for modification here applies to modification of federally established pretreatment standards, and the request to act as the approving or denying authority comes from the federal agency which created these standards. Under the authority of the sections cited above granting the Commission authority to cooperate with federal agencies and take necessary action to satisfy the Federal Water Pollution Control Act, there is the required authority.

The authority for the Commission, to cooperate in the way envisioned by the Federal Regulations is described in those regulations in Section 403.7 wherein it is provided that the POTW is to apply for and receive the described authorization from either the Regional Administrator of EPA or the Director. Hence, the same hand that gave these pretreatment standards also gave the authority to approve or deny the request for modification of these federal standards to the Director. Were these state standards, the Commission clearly has authority to modify the standards it has established. See Sections 204.026(7), (8), (9) and (13).

Mrs. Carolyn Ashford
Page Thirteen

In summary, considering the minimum requirements for legal authority as set forth in Section 403.10(f)(1), it is the view of this office that the Director, as the chief administrative officer for the Missouri Clean Water Commission does have the requisite minimum legal authority referred to in that section of the Federal Regulations.

Very truly yours,

A handwritten signature in cursive script, reading "John Ashcroft", with a long horizontal flourish extending to the right.

JOHN ASHCROFT
Attorney General



JOHN ASHCROFT
ATTORNEY GENERAL

Attorney General of Missouri

JEFFERSON CITY

65101

(314) 751-3321

August 29, 1978

OPINION LETTER NO. 155

Honorable Stan Thomas
State Representative, 18th District
35 South Missouri Street
Liberty, Missouri 64068



Dear Representative Thomas:

This is in answer to your recent opinion request reading as follows:

"As provided by the Missouri statutes, how is the membership of the state senatorial district party committee for the 17th senatorial district to be selected?"

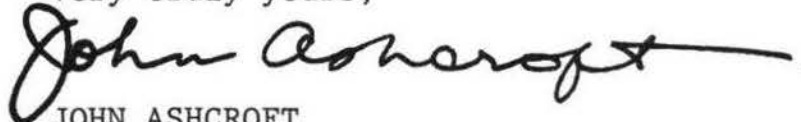
Senatorial District No. 17 includes the entire county of Clay and the entire county of Clinton. Section 115.615, RSMo Supp. 1977, provides that the chairman and vice chairman of the county committee are members of the party senatorial committee of the district of which their county is a part. Therefore, the chairman and vice chairman of the Clay County Committee and the chairman and the vice chairman of the Clinton County Committee are members of the 17th Senatorial District Committee.

Section 115.619, RSMo Supp. 1977, provides that in all counties of this state having more than one entire legislative district the chairman and vice chairman of each legislative district wholly within such county shall be members of the senatorial district of which such county is a part. In view of the fact that legislative district Nos. 19, 20 and 21 are wholly included within Clay County, the chairman and vice chairman of such legislative districts are members of the 17th Senatorial District Committee.

Honorable Stan Thomas

Therefore, the membership of the 17th Senatorial Committee consists of the chairman and vice chairman of Clay County, the chairman and vice chairman of Clinton County, and the chairman and vice chairman of legislative district Nos. 19, 20 and 21.

Very truly yours,

A handwritten signature in black ink, reading "John Ashcroft", with a long horizontal flourish extending to the right.

JOHN ASHCROFT
Attorney General

INSURANCE:

A medical malpractice assessment association under Chapter 383, V.A.M.S., is required to become a member of the Missouri Insurance Guaranty Association and to pay premiums and assessment to such association as required by law.

OPINION NO. 156

October 19, 1978

Honorable Paul L. Bradshaw
State Senator, 30th District
Suite 705, Woodruff Building
Springfield, Missouri 65805



Dear Senator Bradshaw:

This is in response to your opinion request which asks the following question:

"Is a mutual assessment company, which has been licensed by the Director of Insurance under the provisions of Sections 383.010 through 383.040 Revised Statutes of Missouri, for the purpose of providing medical malpractice insurance to its assessed members, required by law to become a member of the Missouri Insurance Guaranty Association, and to pay premiums and assessments to such association, as are provided in Section 375.785, Revised Statutes of Missouri?"

We believe that the following statutes should be considered in connection with our response.

Section 375.785.1, RSMo Supp. 1975, in part states:

"1. There is created a nonprofit unincorporated legal entity to be known as the 'Missouri Insurance Guaranty Association', hereinafter referred to as 'association'. All insurers defined as member insurers in subsection 3 shall be and remain members of the association as a condition of their authority to transact insurance in this state. . . ."

Honorable Paul L. Bradshaw

Additionally, Section 375.785.2, RSMo Supp. 1975, states:

"2. This section shall apply to all kinds of direct insurance, except life, accident and sickness, title, surety, disability, credit mortgage guaranty, and ocean marine insurance." (Emphasis added)

Section 375.785.3 (4), RSMo Supp. 1975, states in part:

"(4) 'Member insurer' means any person who writes any kind of insurance to which this section applies, including the exchange of reciprocal or interinsurance contracts, and is licensed by the division of insurance to transact insurance in this state, except an insurer which was insolvent on September 28, 1971. . . ."

Chapter 383, V.A.M.S., provides for the establishment of a medical malpractice association under an assessment plan. There is nothing within this chapter that would lead us to believe that such association is a life, accident and sickness, title, surety, disability, credit mortgage guaranty, or ocean marine insurer. Thus, we believe that Section 375.785.2, RSMo Supp. 1975, applies to a medical malpractice insurance association wherein it provides that this section shall apply to all kinds of direct insurance except life, accident and sickness, title, surety, disability, credit mortgage guaranty, and ocean marine insurance. The language of the statute is therefore mandatory in that specific mention of certain types of insurance companies is to the exclusion of those which are not mentioned under the principle of expressio unis est exclusio alterius, 82 C.J.S. Statutes § 333. We believe that rules of construction require that we give meaning to the clear language of this section. Consequently, under Section 375.785.1, RSMo Supp. 1975, as a condition of its authority to transact insurance business in this state, a mutual assessment malpractice association under Chapter 383, V.A.M.S., is required to be a member insurer of the Missouri Insurance Guaranty Association.

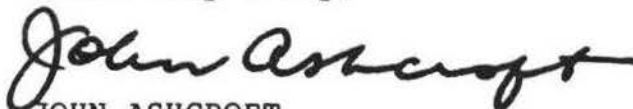
CONCLUSION

It is the opinion of this office that a medical malpractice assessment association under Chapter 383, V.A.M.S., is required to become a member of the Missouri Insurance Guaranty Association and to pay premiums and assessment to such association as required by law.

Honorable Paul L. Bradshaw

The foregoing opinion, which I hereby approve, was prepared by my assistant, Terry C. Allen.

Yours very truly,

A handwritten signature in black ink, reading "John Ashcroft". The signature is written in a cursive style with a large, stylized "J" and "A".

JOHN ASHCROFT
Attorney General



JOHN ASHCROFT
ATTORNEY GENERAL

Attorney General of Missouri

JEFFERSON CITY

65101

(314) 751-3321

September 5, 1978

OPINION LETTER NO. 159

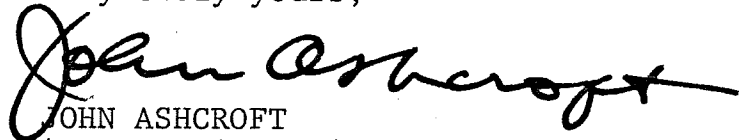
Honorable James C. Kirkpatrick
Secretary of State
State Capitol Building
Jefferson City, Missouri 65101

Dear Mr. Kirkpatrick:

In response to your letter of August 28, 1978, we have prepared the following ballot title for a constitutional amendment proposed by the initiative:

Provides that no person be deprived of the right to work for any employer because of membership or nonmembership in any labor organization or because of payment or non-payment of charges to any labor organization.

Very truly yours,


JOHN ASHCROFT
Attorney General

Attorney General of Missouri

JOHN ASHCROFT
ATTORNEY GENERAL

JEFFERSON CITY
65101

(314) 751-3321

October 17, 1978

OPINION LETTER NO. 161
Answer by Letter - Otto

Honorable Michael J. Lybyer
Representative, 151st District
Huggins, Missouri 65484



Dear Representative Lybyer:

This letter is issued in response to your request for an interpretation of Section 610.105, RSMo Supp. 1975. Such request reads as follows:

"Is an individual who has been acquitted of a criminal charge in magistrate court or whose case has been dismissed entitled to a copy of the court decree of acquittal or the entry showing dismissal of the case?"

Section 610.105, RSMo Supp. 1975, is as follows:

"If the person arrested is charged but the case is subsequently nolle prossed, dismissed, or the accused is found not guilty in the court in which the action is prosecuted, official records pertaining to the case shall thereafter be closed records to all persons except the person arrested or charged."

In the situation from which your question arises, the magistrate court has allowed the person acquitted of the charges to view the record but will not allow the person a copy of the record.

First, we would direct your attention to basic rules of statutory construction:

Honorable Michael J. Lybyer

"The primary rule of statutory construction is to ascertain the intent of the lawmakers from the language used, to give effect to that intent if possible, and to consider words used in the statute in their plain and ordinary meaning.

* * *

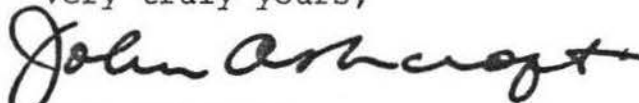
"The purpose and object of the statute must always be considered." [citations omitted] State v. Kraus, 530 S.W.2d 684, 685 (Mo. banc 1975).

Nothing in the wording of Section 610.105, RSMo Supp. 1975, prohibits a person who has been charged and acquitted from getting a copy of his records which have been closed to the general public pursuant to that section. This section explicitly states that the records are not closed to the person charged. The closing of the records merely prevents the general public from obtaining access. Koen v. Poelker, 520 S.W.2d 50, 53 (Mo. banc 1975); and Opinion No. 299 - 1973. The purpose of statutes of this type is to ensure that the person who has been charged but not convicted is not burdened by the fact of the charge. State v. Kraus, supra, at 685-686 (interpreting Section 195.290, RSMo Supp. 1975). Since this statute states explicitly that the records are not closed to the person charged and does not place any restrictions on that person in obtaining access to the records or obtaining copies of them, the person charged cannot be prohibited either from making copies of his records, pursuant to Sections 109.180 and 109.190, RSMo 1969, or from having copies provided him by the clerk.

Section 483.610, RSMo Supp. 1975, provides that clerks of magistrate courts shall charge a certain fee for copies. Since this service is available to persons whose records have not been closed, it should also be available to someone whose records have been closed to the general public but not closed as to him.

Since the purpose of the statute is to protect the accused from being burdened by criminal charges having been made against him in the past, denying him copies of the record showing he was acquitted of a charge would prevent him from taking whatever steps he feels might be necessary to show his innocence to others. This result is so contrary to the language and purpose of the statute that it would be absurd and, therefore, unsupportable. State ex rel. Dravo Corp. v. Spradling, 515 S.W.2d 512, 517 (Mo. 1975).

Very truly yours,



John Ashcroft
Attorney General

Enc: Op. No. 299 - 1973



JOHN ASHCROFT
ATTORNEY GENERAL

Attorney General of Missouri

JEFFERSON CITY

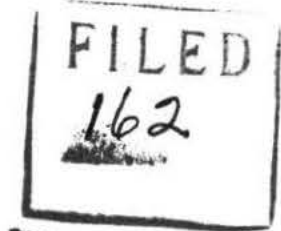
65101

(314) 751-3321

September 13, 1978

OPINION LETTER NO. 162

Honorable James C. Kirkpatrick
Secretary of State
State Capitol Building
Jefferson City, Missouri 65101



Dear Mr. Kirkpatrick:

This is in answer to your recent opinion request asking whether a proposed amendment to the Constitution of Missouri is to be submitted at the November, 1978 General Election, unless the Governor calls a special election prior to such date.

The proposed amendment about which you inquire is contained in House Joint Resolution No. 67 of the 79th General Assembly. Such resolution provides that Section 12(a) of Article X of the Constitution of Missouri is repealed and a new section adopted in lieu thereof to be known as Section 12(a).

The first paragraph of House Joint Resolution No. 67, provides as follows:

"That at the next general election to be held in the state of Missouri, on Tuesday next following the first Monday in November, 1980, or at a special election to be called by the governor for that purpose, there is hereby submitted to the qualified voters of this state, for adoption or rejection, the following amendment to article X of the constitution of the state of Missouri:"

We believe that your opinion request is answered by Opinion No. 129, rendered September 20, 1972, to Representative James G. Baker. Such opinion related to a proposed constitutional amendment

Honorable James C. Kirkpatrick

submitted by the initiative. However, we believe the reasoning therein to be applicable to your question. We enclose a copy of such opinion.

On page 2 of the enclosed opinion we quote a portion of Section 2(b) of Article XII of the Constitution of Missouri, which relates to all amendments proposed by the General Assembly or by the initiative. Therefore, our ruling as to initiative petitions for constitutional amendments in such opinion is also applicable to joint resolutions of the General Assembly of Missouri proposing amendments insofar as the election dates for such proposed amendments are concerned.

In the enclosed opinion we held that the Constitution of Missouri does not provide for the circulators or signers of a petition to designate the date of the election for a proposed amendment and we believe it to be equally clear that there is no provision in the Constitution for any General Assembly of Missouri to designate a date for submission of a proposed amendment to the Constitution which date is after such General Assembly ceases to exist.

The next general election after the passage of House Joint Resolution No. 67 of the 79th General Assembly is the biennial election to be held in November, 1978.

It is therefore our view that the constitutional amendment proposed by House Joint Resolution No. 67 of the 79th General Assembly must be submitted at the November, 1978 General Election unless the Governor of Missouri calls a special election prior thereto at which special election he may submit such proposed amendment.

Very truly yours,

JOHN ASHCROFT
Attorney General

Enclosure: Op. No. 129,
9/20/72, Baker

October 13, 1978

OPINION LETTER NO. 166

Mr. Gerald H. Goldberg
Director of Department of
Revenue
4th Floor, Jefferson Building
Jefferson City, Missouri 65101



Dear Mr. Goldberg:

This letter is issued in response to your request for an opinion on the following subject:

"May the Department of Revenue utilize the Office of Administration's Consolidated State Data Center for the processing of various tax returns which are required to be filed with the Department without subjecting the Director of Revenue or any of his employees to the criminal sanctions imposed by any of the following statutory provisions relating to confidentiality of tax returns:

1. Use Tax, 144.120, RSMo. 1969
2. Sales Tax, 144.120, RSMo. 1969
3. Income Tax, 143.976, RSMo. Cum. Supp.
4. Motor Vehicle Fuel Tax, 142.501,
RSMo. Cum. Supp.
5. Special Motor Fuel Use Tax, 142.170,
RSMo. Cum. Supp.
6. Mass Transportation Tax, 92.408.1(1),
RSMo. 1969
7. City Sales Tax, 94.540.1(1), RSMo. 1969
8. County Sales Tax, 66.615.1(1),
RSMo. Supp. 1977
9. Corporation Franchise Tax, 147.110,
RSMo. 1969, repealed by SB 661

Mr. Gerald H. Goldberg

10. Intangible Personal Property Tax,
146.090, RSMo. 1969
11. Federal Income Tax, 26 U.S.C.A. 7213
and 7217"

Subsection 9 of Section 15 of the Omnibus Reorganization Act of 1974, Appendix B, RSMo, Cumulative Supp. 1975, authorizes the Commissioner of Administration to coordinate and control the acquisition and use of electronic data processing and automatic data processing in the executive branch of state government. See also Section 26.300.3, RSMo, Supp. 1977. In accordance with the legislative mandate, it is our understanding that the Office of Administration has developed a consolidated state data center to be utilized by all agencies of the executive branch for record keeping purposes. It is further our understanding that the Department of Revenue is to be one of the major users of the computer equipment in the data center and is currently in the process of changing from its present internal computer system to that operated by the Office of Administration.

In harmonizing the above provisions with the confidentiality sections mentioned in your opinion request, it is important to keep in mind the overriding purpose behind the imposition of strict standards of secrecy with regard to tax returns and related materials, i.e., the prevention of the dissemination of sensitive and personal information obtained from taxpayers to the general public. In our opinion, the legislature was aware of this and did not create an irreconcilable conflict when it authorized the Commissioner of Administration to coordinate and control the acquisition and use of electronic and automatic data processing. Section 1.6(2) of the Omnibus State Reorganization Act of 1974, Appendix B, RSMo, Cumulative Supp. 1975, specifically authorizes cooperation between the heads of departments in the interchange of personnel, joint use of equipment and generally in any manner to promote the more efficient and effective rendering of service. As such, the Director of Revenue maintains control over these records and can insure through cooperation with the Commissioner of Administration that such information is never released to the public. When the confidentiality sections are read in conjunction with the legislative mandate concerning the use of a centralized computer system in the executive branch of state government under the control of the Commissioner of Administration, it is apparent that the Director of Revenue would not be violating confidentiality by using the central computer system. Rather, those state employees from the Office of Administration performing revenue functions on behalf of the Director of Revenue who have access to the information stored on computer tapes or other

Mr. Gerald Goldberg

storage devices have become, in effect, agents of the Director of Revenue and therefore bound to the confidentiality provisions themselves. Such individuals would be subject to the statutory prohibition against divulging information obtained through the various tax returns.

However, this can only apply in those instances in which the confidentiality statutes are broad enough to encompass agents of the Director of Revenue, and not just the Director or his employees. The following statutes meet that criterion: Section 142.180.3, RSMo 1975 Supp., Motor Vehicle Fuel Tax, which makes it unlawful for any person to disclose the information required by the Director of Revenue or any agent thereof; Section 142.501.1, RSMo 1975 Supp., Special Motor Fuel Tax, which makes it unlawful for the Director or any person having administrative duty to disclose; Section 144.120, RSMo 1969, Sales Tax, which makes it unlawful for the Director of Revenue or his deputy, agent or clerk to disclose; Section 146.090, RSMo 1969, Intangible Personal Property Tax, which prevents disclosure by the Director of Revenue or any of his agents or employees; and Section 147.110.3, RSMo 1969, Corporation Franchise Tax, which forbids disclosure by an officer or employee of the state. The confidentiality section in Missouri sales tax, Section 144.120, RSMo 1969, is also applicable to use tax, mass transportation tax, city sales tax, and county sales tax, as those sections are listed in your request. Employees from the Office of Administration who have authorized access to the information gathered in the above areas, can be considered agents of the Director of Revenue and therefore bound by the confidentiality provisions set forth therein.

A different problem exists with regard to Section 143.976.1, RSMo 1975 Supp., the section dealing with secrecy of income tax returns and information. That section prohibits the Director of Revenue or any officer or employee of the Department of Revenue, or any person engaged or retained by such Department on an independent contract basis from revealing information obtained in state income tax reports or returns. The language in this section is simply not broad enough to cover employees from the Office of Administration. Although they may be considered agents of the Director of Revenue when engaging in a cooperative effort involving both the Director and the Commissioner of Administration, such employees could not be considered officers or employees of the Department of Revenue, or independent contractors. Section 143.976 prohibits the Director of Revenue or his employees from divulging or making known in any manner the amount of income or any particulars set forth or disclosed in any report or return required under the state income tax law. As such, the Director or his employees must maintain

Mr. Gerald H. Goldberg

strict control over all materials which actually disclose such information.

We decline to rule as to the confidentiality requirements of the federal income tax law, Sections 26 U.S.C.A. 7213 and 7217, for the reason that the availability of such federal records to state officials are governed by agreements between federal and state authorities. Whether federal tax returns made available to the Director of Revenue can be processed through the Office of Administration's consolidated state data center is a question which should be taken up with the appropriate federal authorities.

Very truly yours,

John Ashcroft
Attorney General

Attorney General of Missouri

JOHN ASHCROFT
ATTORNEY GENERAL

JEFFERSON CITY

65101

(314) 751-3321

October 12, 1978

OPINION LETTER NO. 170

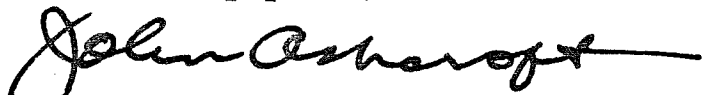
Honorable James Russell
State Representative, District 58
700 Bellarmine Lane
Florissant, Missouri 63031

Dear Mr. Russell:

This letter is in response to your question asking whether a member of the St. Louis County Board of Election Commissioners may receive an increase in salary during his term of office.

It is our understanding that the increase is not given because of any statutory assignment of additional duties. In such a case Section 13 of Article VII is applicable and prohibits an increase in the officer's salary during his term. See Mooney v. County of St. Louis, 286 S.W.2d 763 (Mo. 1956) which is directly in point.

Very truly yours,



JOHN ASHCROFT
Attorney General

COUNTIES:
COUNTY PURCHASES:
COUNTY CONTRACTS:
COUNTY PROPERTY:
PUBLIC NOTICES:

A third class county which wishes to repair and remodel a recently purchased building for use as additional office space for county officials must comply with the provisions of Section 50.660, RSMo.

OPINION NO. 171

October 2, 1978

Honorable James E. McGhee
Prosecuting Attorney
Stoddard County
P. O. Box 2
Bloomfield, Missouri 63825



Dear Mr. McGhee:

This opinion is in response to your question asking whether competitive bidding is required for a contract for extensive repair and remodeling of a recently purchased building for use as additional office space for county officials.

You also state:

"The County Court of Stoddard County, Missouri, recently contracted to purchase an existing building for the purpose of additional office space for county officials. The building is old and will require extensive repair and remodeling. The county has sufficient revenue on hand to pay for the work required. It is anticipated that the funds to be expended for the purchase, repair and remodeling of the building will be drawn from the revenue sharing funds available to the county."

In your request you also refer to an opinion of this office, No. 384, dated September 30, 1963 to McCaffree, in which this office concluded that in the fact situation presented in that opinion

Honorable James E. McGhee

Section 49.420, RSMo did not apply to repairing, remodeling or altering an existing building for a jail and therefore the county court could contract for such work without competitive bidding. Since that opinion was written Sections 50.525, et seq., The County Budget Law, was amended so that Section 50.660, RSMo now applies to third and fourth class counties as well as counties of classes one and two. See our Opinion No. 80, dated June 23, 1971, to McCuskey, enclosed.

Section 50.660 is quoted in that opinion and since it has not been amended since that opinion was issued we will not repeat it here.

We are of the view that the provisions of Section 50.660 are applicable here and as a consequence the county court must advertise for bids for such contracts as provided. See Layne-Western Co. v. Buchanan County, Missouri, 85 F.2d 343 (8th Cir. 1936). It makes no difference that the funding is from revenue sharing funds.

Inasmuch as Opinion 384, dated September 30, 1963 to McCaffree, is no longer appropriate in view of the amendments to the law we have noted, it is hereby withdrawn.

CONCLUSION

It is the opinion of this office that a third class county which wishes to repair and remodel a recently purchased building for use as additional office space for county officials must comply with the provisions of Section 50.660, RSMo.

The foregoing opinion which I hereby approve was prepared by my assistant, John C. Klaffenbach.

Very truly yours,



JOHN ASHCROFT
Attorney General

Enclosure:

Op. No. 80, 6-23-71, McCuskey

Attorney General of Missouri

JOHN ASHCROFT
ATTORNEY GENERAL

JEFFERSON CITY

65101

(314) 751-3321

November 30, 1978

OPINION LETTER NO. 174

Honorable Theodore L. Johnson III
County Counselor, Greene County
833 North Boonville
Springfield, Missouri 65802

Dear Mr. Johnson:

This is in response to a request for an opinion from this office by your assistant, Louis J. Nolan, on the question of whether the public administrator in Greene County had authority to hire assistants to be compensated by county funds during the years 1970 to 1974.

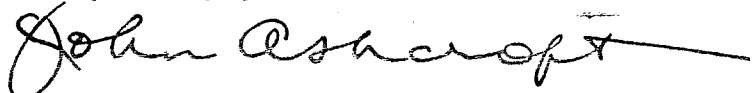
Your request cited Section 473.770, RSMo, as a conferral of authority to public administrators to appoint deputies. It must be emphasized that during the years in question, that is, 1970 to 1974, Greene County was a second class county. Section 473.770, RSMo, by its own provisions refers to first class counties only.

Our research indicates that there was no express statutory provision permitting the public administrator of a second class county to appoint assistants or deputies during the years 1970 to 1974 to be paid out of county funds.

We do not deem it necessary to determine whether the public administrator had authority to appoint assistants for the years 1970 to 1974 because if the public administrator had such authority there was no authority for payment of such "assistants" out of county funds.

In conclusion, this office has been unable to ascertain the existence of any legal authority granting the Greene County Public Administrator the power to appoint assistants during the years 1970 to 1974 to be paid out of county funds.

Very truly yours,



JOHN ASHCROFT
Attorney General

MENTAL HEALTH:
MUNICIPAL COURTS:

The municipal courts of Missouri do not have jurisdiction to commit individuals to facilities of the Department of Mental Health for evaluation or treatment pursuant to Sections 552.020 or 552.040, RSMo.

OPINION NO. 178

December 8, 1978

Dr. C. Duane Hensley
Director
Department of Mental Health
2002 Missouri Boulevard
Jefferson City, Missouri 65101



Dear Dr. Hensley:

This official opinion is in response to your request for a ruling on the following question:

"Do the municipal courts of Missouri have jurisdiction to commit individuals to facilities of the Department of Mental Health for evaluation or treatment pursuant to Sections 552.020 and 552.040, RSMo?"

You ask as to jurisdiction of municipal courts to commit persons to Department facilities under two different circumstances: first, before their trial on charges of violating municipal ordinances, for examination pursuant to Section 552.020, RSMo 1969; and second, after their acquittal in municipal court by reason of mental disease or defect excluding responsibility, for commitment pursuant to Section 552.040, RSMo 1969.

We are unable to find any authority in the cases or statutes enabling municipal court judges to commit persons to state mental facilities for either pre-trial competency evaluations or post-trial commitments.

In contrast to the general jurisdiction of state courts, municipal courts have limited jurisdiction and may not proceed with any matter unless the legislature has given it express authority to do so. The rule was stated in State ex rel. Kelly v. Trimble, 297 Mo. 104, 247 S.W. 187, 191 (Mo.Banc 1922), as follows:

". . . Local courts, those of limited jurisdiction, and inferior courts, not proceeding

Dr. C. Duane Hensley

according to the course of common law, are confined strictly to the authority given, . . . [S]tatutory jurisdiction of courts . . . exists only by statutory warrant, and legislative omission . . . cannot be supplied by judicial construction. [Citation omitted]"

Accordingly, there is no question that

"Municipal courts in Missouri. . . . are courts whose jurisdiction is limited to enforcement of ordinances of that particular city." Kansas City v. Henderson, 468 S.W.2d 48, 50 (Mo. 1971).

For that reason, the municipal court of Kansas City has been held to lack jurisdiction to entertain an offense predicated on a state statute. City of Kansas City v. Bibbs, 548 S.W.2d 264, 266 (Mo.Ct.App. at K.C. 1977).

The distinction between statute and ordinance, of course, is axiomatic:

". . . a statute [is] a law enacted by the State Legislature, and an ordinance [is] a by-law passed or ordained by a city council and under authority of a statute giving it the right to pass such [an] ordinance." Werner v. Pioneer Cooperage Co., 155 S.W.2d 319, 324 (St.L.Ct.App. 1941).

It is clear that in Missouri, criminal commitment proceedings are governed by statute in Chapter 552, RSMo, and not by ordinance. Under Section 552.020(2):

"Whenever any judge or magistrate has reasonable cause to believe that the accused has a mental disease or defect excluding fitness to proceed he shall, upon his own motion or upon motion filed by the state or by or on behalf of the accused, . . . appoint one or more private physicians to make a psychiatric examination of the accused or shall direct the superintendent of a facility of the department of mental health diseases to have the accused so examined . . ."
(Emphasis added)

Dr. C. Duane Hensley

While at first blush the term "any judge" might seem to include municipal court judges, a further reading of the statute precludes this conclusion. The statute plainly indicates its inapplicability to municipal court proceedings, where the state is not a party, by its repeated and consistent references to "the state." See also Section 552.020(6) and (8); Section 552.030(2) and (4).

Further consistent references to the state or county are contained throughout Chapter 552. For example, Section 552.040(4) refers only to the "prosecuting or circuit attorney of the county" and never to the city attorney.

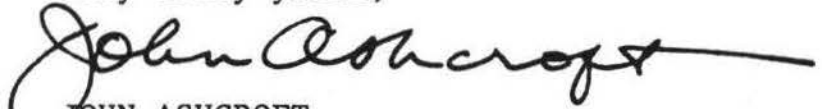
Of particular note is Section 552.080 which specifies that costs of examinations, reports, and expert testimony are to be paid by the county in misdemeanor cases or the state in felony cases. Significantly, no provision is made for the payment of costs from a city treasury to a state institution in cases involving violations of city ordinances.

CONCLUSION

Therefore, it is the opinion of this office that the municipal courts of Missouri do not have jurisdiction to commit individuals to facilities of the Department of Mental Health for evaluation or treatment pursuant to Sections 552.020 or 552.040, RSMo.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Maria Kendro.

Very truly yours,

A handwritten signature in black ink, appearing to read "John Ashcroft", with a long horizontal flourish extending to the right.

JOHN ASHCROFT
Attorney General

ELECTIONS:
CORRUPT PRACTICES:

A corporation, labor union or other organization which only makes campaign contributions or expenditures in excess of \$500 from its own funds or property is not a "committee" for purposes of the campaign financing act and is therefore not required to meet with the organizational and reporting requirements of committees under §§130.021, 130.036 and 130.041, V.A.M.S.

OPINION NO. 179

October 3, 1978



Honorable John D. Schneider
State Senator
State Capitol Building, Room 422
Jefferson City, Missouri 65101

Dear Senator Schneider:

This opinion is in response to your question asking whether a corporation, labor union or other organization which makes campaign contributions or expenditures in excess of \$500 from its own funds or property is a "committee" within the meaning of the newly-enacted Missouri law on campaign financing, §§130.011 to 130.096, V.A.M.S., and is thus required to comply with the organizational and reporting requirements for such committees, as set out in §§130.021, 130.036 and 130.041, V.A.M.S.

Section 130.011 provides in pertinent part as follows:

"As used in this chapter, unless the context clearly indicates otherwise, the following terms mean:

(1) 'Person,' an individual, group of individuals, corporation, partnership, committee, proprietorship, joint venture, union, labor organization, trade or professional or business association, association, political party or any executive committee thereof, or any other club or organization however constituted;

(2) 'Candidate,' an individual who seeks nomination or election to public office.

* * *

(3) 'Write-in candidate,' an individual whose name is not printed on the ballot but who otherwise meets the definition of 'candidate' in subdivision (2) of this section;

(4) 'Committee,' a person or any combination of persons, except an individual (other than a candidate) dealing with his own funds or property, who accepts contributions or makes expenditures for the primary or incidental purpose of influencing or attempting to influence the action of voters for or against the nomination or election to public office of one or more candidates or the qualification, passage or defeat of any ballot measure; however, a person or combination of persons, as described in this subdivision, shall not be deemed to be a committee if neither the aggregate of expenditures made nor the aggregate of contributions received during a calendar year exceeds five hundred dollars for any committee other than an incumbent committee or one thousand dollars for an incumbent committee and if no single contributor has contributed more than fifty dollars of such aggregate contributions" (emphasis supplied).

Viewing the literal meaning of the above-quoted provision, without regard to the context and intent of the campaign financing law as a whole, it would seem that a corporation or labor organization which makes an expenditure of more than five hundred dollars in support of or opposition to a candidate or ballot measure is indeed a "committee" under the above definition. While the term "individual" can in some instances include fictitious persons such as corporations and other legal entities as well as natural persons--see Black's Law Dictionary, "individual," at 913 (rev. 4th ed. 1968)--its use in the above-quoted definitions of "person," "candidate" and "write-in candidate" make clear that the meaning of this term in the present context includes natural persons only. Accordingly, a view of the literal meaning of the statute would suggest that the only "persons" spending more than five hundred dollars who are excluded from the definition of "committee" in §130.011(4) are natural persons dealing with their own funds or property.

As reasonable and logical as this conclusion is from a reading of §130.011 standing alone, however, it results in confusion and contradiction when read in the context of the rest of the campaign financing act. Section 130.051 reads in part as follows:

"1. Any person who is not a defined committee who makes an expenditure or expenditures aggregating five hundred dollars or more in support of or in opposition to the qualification or passage of one or more ballot measures, other than a contribution made directly to a candidate or committee, shall file a report signed by the person making the expenditure, or that person's authorized agent, disclosing the name and address of the person making the expenditure, the date and amount of the expenditure or expenditures, the name and address of the payee, and a description of the nature and purpose of each expenditure. . . The provisions of this subsection shall not apply to a person who uses only its funds or resources to make an expenditure or expenditures in support of or in coordination or consultation with a candidate or committee, provided that any such expenditure is recorded as a contribution to that candidate or committee and so reported by the candidate or committee being supported by the expenditure or expenditures." (emphasis supplied)

It must be concluded from the above-emphasized language that the drafters of the campaign financing act anticipated and intended that persons spending over \$500--including corporations, labor organizations and other fictitious entities--would, under some circumstances, be excluded from the definition of "committee" under §130.011(4); indeed, no other significance in the use of the neuter possessive pronoun "its" in the above section can be perceived. Thus, a conflict in interpretation exists within the campaign financing act as to whether these entities may be excluded from the definition of "committee" under the act when the organization's own funds or resources are used and the expenditure is in excess of five hundred dollars.

In resolving such conflicts, "the cardinal rule of statutory construction is to ascertain the intention of the law-making body and as far as possible to give effect to the intention expressed (citation omitted). Household Finance Corp. v. Robinson, 364 S.W.2d 595, 602 (Mo. banc 1963); see also State ex rel Ashcroft v. Union Electric Co., 559 S.W.2d 216, 220-221 (Mo.Ct.App. at K.C. 1977). Further,

"If a statute is susceptible of more than one construction, it must be given that which will best effect its purpose rather than one which would defeat it, even though such construction is not within the strict literal interpretation of the statute," Household Finance Corp. v. Robinson, *supra* at 602, citing 82 C.J.S. "Statutes" §323, at p. 607.

See also State ex rel Clay Equipment Corp. v. Jensen, 363 S.W.2d 666, 670 (Mo. banc 1963); State ex rel Hall v. Bauman, 466 S.W.2d 177, 180 (K.C. Ct.App. 1971).

Upon examining the alternative interpretations of the term "committee" for purposes of the campaign financing act, it becomes evident that the inclusion therein of corporations, labor unions and other organizations expending their own funds in a political campaign is inconsistent with the policy underlying that act and results in absurd and detrimental consequences.

The clear intent of the campaign financing law is to secure the full disclosure of all significant political contributions, with the ultimate aim of preventing the corruption and secret influence of candidates by large contributors and misconduct and financial deception by fund-raising committees. In seeking to accomplish this purpose, the act places its greatest focus upon the fund-raising organization, the "committee," whose function it is to solicit and receive contributions and to channel these funds for the benefit of the candidate or a particular position with regard to a ballot proposition; see the descriptions of "candidate," "campaign," "continuing" and "incumbent" committees in §130.011(4) (a-c). Thus, such committees are required to appoint a treasurer to manage the funds received, §130.021 (1,2); maintain a separate bank account for these funds, §130.021(4); file a detailed statement of organization, §130.021 (5-7) and a dissolution statement, §130.021(8); maintain complete records of contributions and expenditures, §130.036; and file a disclosure report of all such transactions, §130.041. By contrast, persons who contribute their own funds but who do not act to solicit or collect money from others are required to file only a brief report of the expenditure, and then only when this expenditure is not made directly to a candidate or committee otherwise required to report the transaction under the campaign financing act §130.051(1). It is clear from the above-cited sections and from the act as a whole that the drafters intended to impose the principal burden of disclosure and accountability upon those actively involved in the fund-raising process, while placing as few restrictions and technical obstructions upon mere contributors as was reasonably possible.

The above-described goals and policies would not be served by including without qualification all corporations, labor unions and other entities expending in excess of \$500 within the definition of "committee" under this act. Such an interpretation would impose the considerable filing and reporting requirements set out above upon these entities, regardless of the fact that their only action was as a contributor of their own funds and not as a fund-raiser receiving contributions from others. As a result, it would require every non-individual contributor in this state giving more than \$500 to appoint a treasurer, maintain a separate bank account, keep financial records and file a disclosure report of all contributions received by them when in fact they have neither received nor intended to receive such contributions. Moreover, this requirement would result in an unnecessary duplication of reporting, in that contributions must in any event be reported by the fund-raising committee receiving that contribution, and expenditures not made directly to a candidate or committee must be reported by the contributor under §130.051(1).

To require that all non-individual contributors of over \$500 register as committees is not only unnecessarily burdensome, as shown above, but it also raises questions with regard to the First Amendment rights of members of these groups. A recent decision of a federal district court in New York, construing the New York campaign disclosure act, held that the reporting and disclosure requirements of that act (somewhat similar to those in the statute at issue) "can only be constitutionally applied to those groups the major purpose of which is the success or defeat of a 'political party or principle, or of any question submitted to vote at a public election'" (emphasis supplied; citation omitted). New York Civil Liberties Union, Inc. v. Acito, No. 75 CIV. 5378, slip opinion at 23-24 (S.D.N.Y., July 20, 1978) (copy attached). See also Buckley v. Valeo, 519 F.2d 821, 874 (D.C.Cir. 1975); affirmed in part and reversed in part, 424 U.S.1 (1976); United States v. National Committee for Impeachment, 469 F.2d 1135, 1141 (2nd Cir. 1972); American Civil Liberties Union, Inc. v. Jennings, 366 F.Supp. 1041, 1057 (D.D.C. 1973), vacated as moot sub nom. Staats v. ACCV, 422 U.S. 1030 (1975). While it is unnecessary, in view of the conclusion of this opinion, to resolve whether the committee registration and reporting requirements in the Missouri statute could constitutionally be applied to corporations, labor unions and other entities which merely contribute or expend their own funds in support of a candidate or ballot issue, this question presents an additional basis for the opposite interpretation. See Chamberlin v. Missouri Election Comm'n., 540 S.W.2d 876, 879 (Mo. banc 1976).

As has repeatedly been held by the courts of this state, a statute should not be construed in a manner that would give an absurd or unreasonable result. State ex rel Dravo Corp.

v. Spradling, 515 S.W.2d 512, 517 (Mo. 1974); Taylor v. McNeal, 523 S.W.2d 148, 152 (Mo.Ct.App. at St.L. 1975).
Moreover,

"Acting on the presumption that the legislature never intends to enact an absurd law, incapable of being enforced, and on the principle that the reason of the law should prevail over the letter of the law, courts on numerous occasions, confronted with ambiguous or contradictory language, have adopted a construction which modifies the literal meaning of the words, or in extreme cases have stricken out words or clauses regarded as improvidently inserted, in order to make all sections of a law harmonize with the plain intent or apparent purpose of the legislature" (footnote omitted).
City of Joplin v. Joplin Water Works Company, 386 S.W.2d 369, 373-374 (Mo. 1965).

See also State ex rel McClellan v. Godfrey, 519 S.W.2d 4, 9 (Mo. banc 1975); Bank of Belton v. State Banking Board, 554 S.W.2d 451, 456 (Mo.Ct.App. at K.C. 1970; State ex rel Pauli v. Geers, 462 S.W.2d 166, 169 (St.L.Ct.App. 1970).
Where, as here, two provisions in a legislative enactment are directly contradictory, it is clear that one must yield to preserve the integrity and fulfill the intent of the act. Accordingly, it is submitted, the term "individual" as it is used in §130.011(4) must be construed as including fictitious entities and organizations, such as corporations and labor unions, as well as natural persons. Therefore, such an entity or organization which expends in excess of \$500 of its own funds or property for campaign purposes does not constitute a "committee" under the above-cited section.

CONCLUSION

It is the conclusion of this office that a corporation, labor union or other organization which only makes campaign contributions or expenditures in excess of \$500 from its own funds or property is not a "committee" for purposes of the campaign financing act and is therefore not required to meet with the organizational and reporting requirements of committees under §§130.021, 130.036 and 130.041, V.A.M.S.

The foregoing opinion, which I hereby approve, was prepared by my assistant, John M. Morris.

Very truly yours,



JOHN ASHCROFT
Attorney General

ELECTIONS:
NURSING HOME DISTRICTS:
STATUTORY CONSTRUCTION:

Each voter in a nursing home district election shall vote for the director from his district as provided in House Bill 1208, Second Regular

Session, 79th General Assembly, and not for all six directors, as provided in House Bill 971, Second Regular Session, 79th General Assembly. Such bills should be merged to give effect to new provisions and the provisions of such bills which are reenactments which conflict with new matter will give way to such new matter. Where the legislature has deleted old provisions in one bill but has not done so in the other bill, such deletions should be given effect.

NOTE: See amendments in Section 198.280, RSMo Supp. 1983, which affect the conclusion reached here.

OPINION NO. 180

December 29, 1978

Honorable James C. Kirkpatrick
Secretary of State
Capitol Building, Room 209
Jefferson City, Missouri 65101



Dear Mr. Kirkpatrick:

This opinion is in response to your question asking:

"Is each voter of a nursing home district allowed to vote only for the director from his election district or for six directors, one from each district?"

You further state:

"House Bill 971 and House Bill 1208 each containing section 198.280, relating to nursing home districts, were enacted during the last legislative session.

"House Bill 971 provides that each voter of the district votes for all directors in the district.

"House Bill 1208 provides that each voter votes only for the director for the voters' subdistrict."

Section 198.280 of House Bill 971 of the Second Regular Session, 79th General Assembly, provides:

Honorable James C. Kirkpatrick

"1. After the nursing home district has been declared organized, the declaring county court shall divide the district into six election districts as equal in population as possible, and shall by lot number the districts from one to six inclusive. The county court shall cause an election to be held in the nursing home district within ninety days after the order establishing the nursing home district to elect nursing home district directors. Each voter shall vote for six directors, one from each district. The director elected from district number one shall serve a term of one year, the director elected from district number two shall serve a term of two years, the director elected from district number three shall serve a term of three years, the director elected from district number four shall serve a term of four years, the director elected from district number five shall serve a term of five years, and the director elected from district number six shall serve a term of six years; thereafter, the terms of all directors shall be six years. All directors shall serve until their successors are elected and qualified.

"2. Candidates for director of the nursing home district shall be citizens of the United States, voters of the nursing home district who have resided within the state for one year next preceding the election and who are at least thirty years of age. All candidates shall file their declarations of candidacy with the county court calling the election."

Section 198.280, of House Bill 1208, Second Regular Session, 79th General Assembly, provides:

"1. After the nursing home district has been declared organized, the declaring county court shall divide the district into six election districts as equal in population as possible, and shall by lot number the districts from one to six inclusive. The county court shall cause an election to be held in the nursing home district within ninety days after the order establishing the nursing home district to elect nursing home district directors. The election shall be called, held and conducted and

Honorable James C. Kirkpatrick

notice shall be given as provided in sections 198.240 to 198.270, and each voter shall vote for the director from his district. The director elected from district number one shall serve a term of one year, the director elected from district number two shall serve a term of two years, the director elected from district number three shall serve a term of three years, the director elected from district number four shall serve a term of four years, the director elected from district number five shall serve a term of five years, and the director elected from district number six shall serve a term of six years; thereafter, the terms of all directors shall be six years. All directors shall serve until their successors are elected and qualified.

"2. Candidates for director of the nursing home district shall be citizens of the United States, resident taxpayers of the nursing home district who have resided within the state for one year next preceding the election and who are at least thirty years of age. All candidates shall file their declarations of candidacy with the county court calling the election at least twenty days prior to the special election."

Both bills repealed Section 198.280, RSMo 1969, and both bills became effective August 13, 1978. You are aware, of course, that House Bill 971 was the general election revision bill which was intended to bring a large number of statutes into conformity with the general election laws of Missouri.

Section 198.280, as contained in House Bill 971, changed the 1969 laws in three ways. The provision in the 1979 laws that the election shall be called, held and conducted and notice shall be given, as provided in Sections 198.240 to 198,270, was deleted, although the provision that each voter vote for six directors, one from each district, was retained. The provision of subsection 2 of Section 198.280 RSMo 1969, which required that candidates be resident taxpayers of the nursing home district was deleted and amended in House Bill 971 to require that the candidates, in addition to the other requirements, be voters of the nursing home district. In addition, the final clause of subsection 2 of Section 198.280, RSMo 1969, was deleted omitting the requirement that the declaration of candidacy be filed with the county court calling the election

Honorable James C. Kirkpatrick

at least twenty days prior to the special election although the first part of the last sentence was retained so that the provision remains that all candidates file their declaration of candidacy with the county court calling the election.

House Bill 1208 did not make any change in subsection 2 of Section 198.280, RSMo 1969, but did delete from subsection 1 of that section the provision that each voter vote for six directors, one from each district and inserted the provision that each voter shall vote for the director from his district.

Section 1.120, RSMo, provides:

"The provisions of any law or statute which is reenacted, amended or revised, so far as they are the same as those of a prior law, shall be construed as a continuation of such law and not as a new enactment."

We note that the Supreme Court of Illinois in People ex rel. Brenza v. Fleetwood, 109 N.E.2d 741 (1952) stated at l.c. 751:

"The mechanical approach which the objector here urges upon us--a reading of the two amendments to determine literal inconsistency, followed by an automatic enforcement of the one which was adopted last in point of time--has been rejected by this court. Where acts passed at the same session of the legislature contain conflicting provisions, we have held that the whole record of the legislation is open to examination in order to ascertain the legislative intent. And when the intent is ascertained, it is given effect, irrespective of priority of enactment."

We further note that the Supreme Court of Missouri in the case of State ex rel. Karbe v. Bader, 78 S.W.2d 835 (1934) stated at l.c. 839:

"There was nothing in House Bill No. 44 in the nature of new legislation. Its sole object was to amend section 9952 (the effective law at the time House Bill No. 44 was introduced) in so far as it related to back tax attorneys in counties of a designated population. It seems obvious, and we hold that the nominal re-enactment of section 9952 by House Bill No. 44 was not intended to, nor did it have the effect of impliedly repealing or otherwise disturbing the Jones-Munger Act.
. . ."

Honorable James C. Kirkpatrick

Therefore, utilizing what we believe to be the proper rule of construction to arrive at the legislative intent we conclude that both acts have to be read together and that in doing so the new provisions of both acts should be given effect and the old provisions which were merely reenactments of Section 198.280, RSMo 1969, should be disregarded to the extent that they conflict with such new provisions. In addition, where either law has deleted a provision which existed in Section 198.280, RSMo 1969, such deletion should be given effect even though such provision was reenacted in the other bill.

Thus, the provision of House Bill 1208 which purports to require that the election shall be called, held and conducted and notice given as provided in Sections 198.240 to 198.270 should not be given effect since such provision was contained in Section 198.280, RSMo 1969, and was deleted by House Bill 971.

The provision of Section 198.280 of House Bill 1208 providing that each voter shall vote for the director from his district is a new provision whereas the provision in House Bill 971 relating to such voters merely carried over the old provisions of Section 198.280 which provided that each voter vote for six directors, one from each district. Accordingly, the new provision should be given effect, the old conflicting provision in House Bill 971 should be ignored and each voter should vote only for the director from his district.

Since subsection 2 of Section 198.280 of House Bill 1208 is a reenactment of subsection 2 of Section 198.280, RSMo 1969, such subsection should be ignored insofar as it concerns the requirement that candidates for directors be resident taxpayers of the district and that declarations of candidacy be filed at least twenty days prior to a special election and the new provisions in subsection 2 of Section 198.280, House Bill 971, are to be given effect. Therefore, in addition to other qualifications provided for in House Bill No. 971 candidates for director of nursing home districts must be voters of the nursing home district. The twenty day filing requirement and the requirement that voters be resident taxpayers of the nursing home district which are found under subsection 2 of such section in House Bill 1208 should be ignored.

CONCLUSION

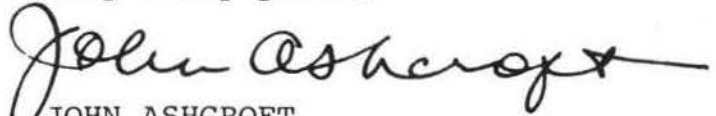
It is the opinion of this office that each voter in a nursing home district election shall vote for the director from his district as provided in House Bill 1208, Second Regular Session, 79th General Assembly, and not for all six directors, as provided in House Bill 971, Second Regular Session, 79th General Assembly. Such bills should be merged to give effect to new provisions and the provisions

Honorable James C. Kirkpatrick

of such bills which are reenactments which conflict with new matter will give way to such new matter. Where the legislature has deleted old provisions in one bill but has not done so in the other bill, such deletions should be given effect.

The foregoing opinion which I hereby approve was prepared by my assistant, John C. Klaffenbach.

Very truly yours,


JOHN ASHCROFT
Attorney General

Attorney General of Missouri

JEFFERSON CITY

(314) 751-3321

JOHN ASHCROFT
ATTORNEY GENERAL

65101

October 20, 1978

OPINION LETTER NO. 187

Mr. Stephen C. Bradford
Commissioner of Administration
Office of Administration
State Capitol Building
Jefferson City, MO 65101



Dear Mr. Bradford:

You have requested an opinion as follows:

"May an agency of the State of Missouri requesting bids pursuant to Section 34.040, RSMo 1969, accept only the lowest bid or is the agency required to accept the lowest and best bid?"

In response to such request we enclose a copy of Attorney General's Opinion No. 28, dated August 28, 1941, which we believe answers your question. In addition, we enclose herewith a copy of Section 34.040, with the pertinent language underlined.

If we may be of any further assistance please let us know.

Yours very truly,

A handwritten signature in cursive script, reading 'John Ashcroft'. The signature is fluid and elegant, with a prominent 'J' and 'A'.

JOHN ASHCROFT
Attorney General

Enclosure

STATE PURCHASING AGENT

When two or more bidders tie in amounts bid, the State Purchasing Agent may declare one the lowest and best bidder.

August 28, 1941



Mr. Ted Ferguson
State Purchasing Agent
Jefferson City, Missouri

Dear Mr. Ferguson:

This department is in receipt of your letter wherein you request an opinion based on the following question:

"At your earliest convenience, will you please render this office an opinion as to what procedure we should follow in the awarding of contracts when the lowest and best bid is a tie between two or more vendors."

"For your own information, this matter has been discussed with one of your Assistants, Mr. Creech."

The Purchasing Act was enacted in 1933 and is now Chapter 104, Sections 14589 to 14602, inclusive, R.S.Mo. 1939. Section 14591 relates to purchases on competitive bids. As two or more bidders have submitted bids for the same sum, or in other words, the bids are identical, the question arises as to the meaning of the sentence "The contract shall be let to the lowest and best bidder."

It was held in *State vs. Herman*, 59 N.E. 104, 63 Ohio State 440, that public officers had a certain discretion in awarding contracts and could not be mandamus-ed even though it was their duty to award the contracts to the lowest and best bidders. The phrase "lowest and best bidder" was under construction in the case of *Wilmott Coal Company vs. State Purchasing Commission*, 54 S.W. (2d) 634. It was held in that decision that the State Purchasing Commission of Kentucky should consider not only the amount of the bid, but also possible judgment, capability, skill and responsibility of the bidder and the quality of the good which was proposed to be furnished. In the decision of *Altschul vs. the City of*

Ted Ferguson

-2-

August 28, 1941

Springfield, 193 N.E. 788, the words lowest and best bidder were construed not to be the lowest dollar bidder but that the city authorities had discretion in determining what was, under all the circumstances, the lowest and best bid for the work involved.

Therefore, taking into consideration the meaning of the expression lowest and best bidder, along with the other terms of the statute which give the purchasing agent the right to refuse any or all bids, and advertise for new bids, or, with the approval of the Governor, to purchase the required supplies in the open market, we are of the opinion that you have the authority to determine yourself who of the two or more persons submitting equal bids is the lowest and best bidder, taking into consideration the quality of the goods or merchandise, responsibility of the bidder, and other elements which the above authorities indicate should be taken into consideration. The other alternative is that you could refuse the bids if you decide that none of the lowest are the best bidders and readvertise for new bids, or purchase the required supplies on the open market with the approval of the Governor.

Respectfully submitted,

OLLIVER W. NOLEN
Assistant Attorney General

APPROVED:

VANE C. THURLO
(Acting) Attorney General

of Entry, Use and Occupancy" type of lease, and the execution of such an instrument would not jeopardize the title of the state to such property. Op. Atty. Gen. No. 81, Sheppard, 8-20-52.

4. Actions

A state officer was a real party to action against state purchasing agent, in his official capacity as such, steward of a state hospital and Board of Managers of State Eleemosynary Institutions for breach of a lease agreement executed by purchasing agent's predecessor in office so as to give Supreme Court jurisdiction on direct appeal. *White v. Jones* (1944) 177 S.W.2d 603, 352 Mo. 354.

The Board of Managers of State Eleemosynary Institutions was liable to suit without consent of state for breach of lease of land for state hospital, since a "proprietary" matter was involved. *Id.*

5. Approval necessary

The present State Purchasing Agent was required to approve departmental direct purchase orders placed upon the verbal permission of his predecessor in office and involving purchases of an emergency or technical nature where immediate delivery was necessary. Op. Atty. Gen. No. 66, Nelson, 5-26-53.

34.040. Purchases to be made on competitive bids—standard specifications

All purchases shall be based on competitive bids. On any purchase where the estimated expenditure shall be two thousand dollars or over, the purchasing agent shall advertise for bids in at least two daily newspapers of general circulation in such places as are most likely to reach prospective bidders at least five days before bids for such purchases are to be opened. On purchases where the estimated expenditure is less than two thousand dollars, bids shall be secured without advertising. In all cases, the purchasing agent shall post a notice of the proposed purchase on a bulletin board in his office. He shall also, on all purchases estimated to exceed two thousand dollars, solicit bids by mail from prospective suppliers. All bids for such supplies shall be mailed or delivered to the office of the purchasing agent so as to reach such office before the time set for opening bids. The contract shall be let to the lowest and best bidder. The purchasing agent shall have the right to reject any or all bids and advertise for new bids, or, with the approval of the governor, purchase the required supplies on the open market if they can be so purchased at a better price. All bids shall be based on standard specifications wherever such specifications have been prepared by the purchasing agent as provided in section 34.050. The purchasing agent shall make rules governing the delivery, inspection, storage and distribution of all supplies so purchased and governing the manner in which all claims for supplies delivered shall be submitted, examined, approved and paid. He shall determine the amount of bond or deposit and the character thereof which

Ch. 34 PURCHASING AND PRINTING § 34.050

shall accompany bids. (R.S.1939, § 14591, as amended L.1945, p. 1428 § 65)

Historical Note

Prior Laws and Revisions:

Mo.R.S.A. § 11008.65.
L.1933, p. 410, § 2.

Cross References

United States, contracts with, excepted from statutory requirements, see § 34.110.

Law Review Commentaries

Specifications for public contracts: Daniel R. Mandelker, 1951 Wash.U.L. Q. 513 (Dec.).
a critique of competitive bidding.

Library References

States C=9S.

C.J.S. States § 116.

Notes of Decisions

1. Construction and application

This section did not govern the purchase of a typewriter by the newly created Board of Registration of Architects and Professional Engineers which was required to function immediately, since such section could have no application to newly created board which had no appropriation. State ex rel. Averill v. Smith (1944) 175 S.W.2d 331, 352 Mo. 23.

Claim for materials furnished to state highway commission and used in construction of supplementary state highway held not within operative effect of this act, entitling claimant to warrant from state auditor in payment of claim, although purchase of materials was not made or approved by state purchasing agent. State ex rel. R. Newton McDowell, Inc. v. Smith (1934) 67 S. W.2d 50, 334 Mo. 653.

Purchases of used equipment had to be made by the state purchasing

agent on competitive bids, however, if such supplies could be purchased at a better price on the open market he could make such purchases with the approval of the Governor. Op. Atty.Gen. No. 35, State Park Board, 12-14-53.

Purchasing agent has discretion to determine in what two newspapers of state he will advertise for bids pursuant to this section within limitation that the newspaper selected be dailies of general circulation and be published in places which are most likely to reach prospective bidders at least five days before bids for the purchases are to be opened. Op. Atty.Gen. No. 17, Clarin, 4-19-50.

Determination as to what newspapers come within requirement of this section lies within Purchasing Agent's discretion, and his decision is final. Id.

34.050. To make regulations for purchase of supplies

The purchasing agent shall make and adopt such rules and regulations, not contrary to the provisions of this chapter, for the purchase of supplies and prescribing the purchasing policy of the state as may be necessary. He shall classify the require-

Attorney General of Missouri

JOHN ASHCROFT
ATTORNEY GENERAL

JEFFERSON CITY

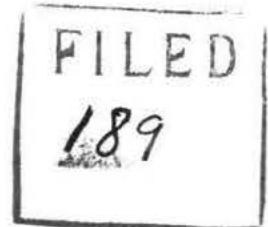
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(314) 751-3321

November 13, 1978

OPINION LETTER NO. 189
Answer by Letter - Wieler

Honorable C. E. Hamilton, Jr.
Prosecuting Attorney
Callaway County Courthouse
Fulton, Missouri 65251



Dear Mr. Hamilton:

This letter is issued in response to your opinion request which reads as follows:

"Is it illegal for an automobile owned by a mobile home trailer dealer bearing dealer plates issued pursuant to Section 301.250 RSMo 1969 to be used by the dealer's wife as an 'escort' vehicle in the transportation of a mobile home sold by the dealer?"

From the statement of facts accompanying your request, it is our understanding that this mobile home dealer in your county has regularly been using an automobile owned by him to escort mobile homes that he has sold to the place of destination. This automobile bears dealer's license plates which were issued to the mobile home dealer pursuant to Section 301.250, RSMo 1969.

Section 301.250, RSMo 1969, requires all persons engaged in the business of buying or selling motor vehicles or trailers to be licensed as dealers in this state, unless such persons buy or sell less than four vehicles in any one calendar year. Subsections 2 and 3 of Section 301.250 read as follows:

"2. Fees and plates for manufacturers and dealers: On the payment of a registration fee of fifty dollars there shall be assigned to such manufacturer or dealer a certificate of registration in such form as the director of

revenue shall prescribe, and one number plate bearing such number. As many duplicate number plates as may be desired may be obtained upon the payment of a fee of ten dollars and fifty cents for each duplicate.

"3. The dealer plates may be displayed on any motor vehicle used by an employee or officer and owned by the manufacturer or dealer, but shall not be displayed on any motor vehicle or trailer hired or loaned to others or upon any regularly used service or wrecker vehicle."

A general discussion of Section 301.250 is contained in Attorney General's Opinion No. 355, issued August 18, 1970, to the Honorable James L. Paul (copy enclosed). Among other things, it is stated on page 2 of that opinion that the dealer's license issued to any individual under the provisions of Section 301.250 may be displayed only upon a vehicle which is being held for sale by a dealer. This being so, nothing would prevent an individual licensed to sell mobile home trailers from placing his dealer plates upon a motor vehicle being held for sale. However, subsection 3 of Section 301.250, as quoted above, clearly prohibits the use of dealer plates "upon any regularly used service or wrecker vehicle."

From the facts set forth in your request, it is apparent that the automobile in question in this matter has been used regularly by the mobile home dealer to escort mobile homes that he has sold. Such an "escort" is necessary in order to comply with the rules of the Missouri State Highway Commission when moving oversized vehicles on public highways pursuant to Section 304.200, RSMo 1975 Supp. The term "escort" is defined in the State Highway Commission's rules, 7 CSR 10-2.010(9)(A), as a "vehicle with operator which accompanies overload movements to serve as warning to other traffic that extra caution is required." Such escort vehicles must be equipped with certain warning signs or flags. See 7 CSR 10-2.010(9)(D) and (E). Under these circumstances, it is our opinion that such a vehicle is a "service" vehicle as that term is used in subsection 3 of Section 301.250. This plus the fact that the vehicle is regularly used by the dealer or his wife in escorting mobile homes sold by the dealer would render the use of a dealer plate on such a vehicle unlawful.

Very truly yours,

JOHN ASHCROFT
Attorney General

Enclosure: Op. No. 355, 8/18/70, Paul

November 17, 1978

OPINION LETTER NO. 193
Answer by Letter - Klaffenbach

Honorable John A. Parks
Prosecuting Attorney
Polk County Courthouse
Bolivar, Missouri 65613



Dear Mr. Parks:

This letter is in response to your question asking whether the requirements of Section 108.180, RSMo, that debt service funds be kept "separate and apart from all other funds of such governmental unit, so that there shall be no commingling of such funds with any other funds of such . . . school district . . ." mean that a separate depository for debt service funds must be maintained or whether it is sufficient to have single depository with ledger accounting of all funds of the subdivision.

By the term "depository" we understand that you mean a separate account and not a separate depository institution.

It is our view that the language of Section 108.180 is quite clear and has an established meaning. Words and phrases are required to be taken in their plain or ordinary and usual sense except that technical words and phrases which have an appropriate meaning in law shall be understood according to their technical import. Section 1.090, RSMo.

We find no Missouri cases defining the term "commingle". However, it seems clear that the word commingle means to put together in one mass. Pfau v. State, 47 N.E. 927 (Ind. 1897).

Honorable John A. Parks

The legislature has provided that the debt service funds be kept separate and apart and that they shall not be commingled with other funds. Such a requirement must be accepted literally. Therefore, it is not proper for the funds to be maintained in one account with other school system funds segregated only by the school's ledger entries.

Very truly yours,

JOHN ASHCROFT
Attorney General

PROSECUTING ATTORNEYS:

FEES, COMPENSATION AND SALARIES:

STATUTORY CONSTRUCTION:

With respect to the amendments

made to Section 56.310, RSMo

1969, by House Bill No. 1052

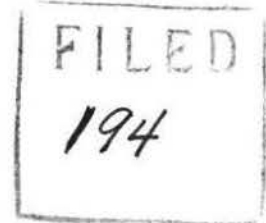
and House Bill No. 1634, both

enacted by the 79th General Assembly, Second Regular Session, that the prosecuting attorney fees provided for in House Bill No. 1052 remain in effect after January 2, 1979.

OPINION NO. 194

December 29, 1978

Honorable Meredith Ratcliff
Prosecuting Attorney
Adair County
P. O. Box 422
Kirksville, Missouri 63501



Dear Mr. Ratcliff:

This opinion is in response to your question asking as follows:

"House Bill No. 1052 (VAMS Legislative Service 1978, No. 1) shown as 56.310 sets forth a schedule to be effective on 8-13-78. See page 221 of pamphlet No. 1.

"House Bill No. 1634 (VAMS Legislative Service 1978, No. 3) shown as 56.310 sets forth a schedule to be effective on 1-2-79. See page 641 of pamphlet No. 3.

"Recognizing that the schedules are different in the two bills and House Bill 1634 does not appear to repeal House Bill 1052, and recognizing that in pamphlet No. 3, page 641 we are advised that the two versions should be read together [by the Revisor's note] MY QUESTIONS ARE:

1. What law is applicable on 8-13-78?
2. What law is applicable on 1-2-79?"

HONORABLE MEREDITH RATCLIFF

As you have indicated, Section 56.310, RSMo 1969, was amended both by House Bill 1052 and House Bill 1634 of the Second Regular Session, 79th General Assembly. House Bill 1634 is commonly known as the "Court Revision Bill." House Bill 1052 made amendments only to Section 56.310, RSMo 1969.

The Court Revision Bill made no changes in the fee schedule set out in Section 56.310, RSMo 1969. However, such bill deleted from Section 56.310 the following language:

". . . for the conviction of every defendant in the circuit court, upon indictment or information, or before a magistrate court, upon information, when the punishment assessed by the court or jury or magistrate shall be fine or imprisonment in the county jail, or by both such fine and imprisonment, . . ."

And, inserted in lieu thereof the following language:

". . . for the conviction of every defendant for violating a state law in the circuit court, upon indictment or information, when the punishment assessed by the court or jury shall be fine or imprisonment in the county jail, or by both such fine and imprisonment, . . ."

House Bill 1052 retained the language of Section 56.310, RSMo 1969, above quoted, which was deleted by House Bill 1634. House Bill 1052 made changes only in the fees allowable to the prosecuting attorney.

As you have noted, House Bill 1052 was effective August 13, 1978, and House Bill 1634 (the court revision bill) is effective, with respect to this particular section, on January 2, 1979. Neither bill contains any provision giving us positive direction as to how such conflicts should be interpreted. The court revision bill contains a special provision with respect to legislative conflicts concerning officers' salaries. However, the fee provisions of Section 56.310 do not affect the prosecuting attorney's salary since such fees are required to be paid into the county treasury. See Sections 56.320, 56.330, and 56.340, RSMo.

HONORABLE MEREDITH RATCLIFF

Obviously House Bill 1052 is presently effective, and the increased fee schedule is in effect. If we were to disregard the increased fee schedule set out in House Bill 1052 on the effective date of House Bill 1634, we would, of course, be reverting to the fee schedule which was provided for in Section 56.310, RSMo 1969. We do not believe this to be the legislative intent.

House Bill 1634 has been designated as the "Court Reform and Revision Act of 1978." See Section 1 thereof. As such, it revises numerous sections in diverse parts of the law to give effect to the amendments to Article V of the Missouri Constitution which are effective January 2, 1979, except as otherwise specifically provided therein. In this respect, we note that Section 1.120, RSMo, provides that:

"Provisions of any law or statute which is reenacted, amended or revised, so far as they are the same as those of a prior law, shall be construed as a continuation of such law and not as a new enactment."

While, as we stated, the court revision bill does give us some guidance in certain respects as to how conflicts with other statutes enacted at the same session of the legislature will be construed, it is not reasonable to believe that the ordinary rules of construction will not be followed in those areas of conflict not expressly covered by such bill.

In this respect, in addition to the above-quoted provisions from Section 1.120, RSMo, we find some guidance in the provisions of Section 3.065, RSMo, which provide as follows:

"1. If any section of the revised statutes, supplement or pocket part, or of any act of the general assembly is amended or reenacted by more than one act at the same session of the general assembly, the section may be incorporated in the revised statutes edition, supplement or pocket part as amended or altered by the several acts if the amendments, changes or alterations can be incorporated in the section in such manner as to make the section intelligible. In any such case the revisor of statutes shall insert a note at the end of the section explaining the insertions

or omissions accomplished by the various enactments. If the section cannot be made intelligible by incorporation of the amendments the section as enacted by each of the several acts shall be published in full.

"2. If any section of existing law affected by a revision act is amended, reenacted or repealed by other acts passed at the same regular or extra session of the general assembly, the revision act shall be given effect only to the extent that its provisions do not conflict with the changes made in the existing law by the other acts and, in accordance with this provision, the section shall be shown as repealed or incorporated in the statutes as amended or altered by the several acts passed affecting it. The revisor of statutes, in such cases, shall insert an explanatory note at the end of the section indicating the changes made in its provisions by the several enactments."

Utilizing the above-quoted provisions as a guide for construction with respect to these bills, we believe that the proper effect is given to the legislative intent by reading the two bills together as of January 2, 1979, so that the changes made in the respective bills will be construed as being in effect as of that date. This means then that all of the changes made in the fees allowable to the prosecuting attorney, under the provisions of House Bill 1052, will be in effect not only between the effective date of House Bill 1052 and the effective date of House Bill 1634 but also after the effective date of House Bill 1634. This also means then that the change made by House Bill 1634, above noted, will also be given effect as of January 2, 1979.

We note that the Supreme Court of Illinois in People ex rel Brenza v. Fleetwood, 109 N.E.2d 741 (1952) stated at l.c.751:

"The mechanical approach which the objector here urges upon us--a reading of the two amendments to determine literal inconsistency, followed by an automatic enforcement of the one which was adopted last in point of time--has been rejected by this court. Where acts passed at the same session of the legislature contain conflicting provisions, we have held that the whole record of the legislation is open to examination in order to ascertain the legislative intent. And when that intent is ascertained, it is given effect, irrespective of priority of enactment."

HONORABLE MEREDITH RATCLIFF

Additionally, we note that the Supreme Court of Missouri in the case of State ex rel Karbe v. Bader, 78 S.W.2d 835 (1934) stated at l.c. 839:

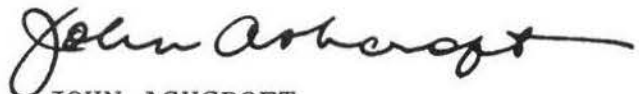
"There was nothing in House Bill No. 44 in the nature of new legislation. Its sole object was to amend section 9952 (the effective law at the time House Bill No. 44 was introduced) in so far as it related to back tax attorneys in counties of a designated population. It seems obvious, and we hold that the nominal re-enactment of section 9952 by House Bill No. 44 was not intended to, nor did it have the effect of impliedly repealing or otherwise disturbing the Jones-Munger Act."

CONCLUSION

It is the opinion of this office with respect to the amendments made to Section 56.310, RSMo 1969, by House Bill No. 1052 and House Bill NO. 1634, both enacted by the 79th General Assembly, Second Regular Session, that the prosecuting attorney fees provided for in House Bill No. 1052 remain in effect after January 2, 1979.

The foregoing opinion which I hereby approve was prepared by my assistant, John C. Klaffenbach.

Very truly yours,



JOHN ASHCROFT
Attorney General

Attorney General of Missouri

JOHN ASHCROFT
ATTORNEY GENERAL

JEFFERSON CITY

65101

(314) 751-3321

December 12, 1978

OPINION LETTER NO. 198

Honorable James F. McHenry
Prosecuting Attorney
Cole County
Suite 400, County Courthouse
Jefferson City, Missouri 65101

Dear Mr. McHenry:

This letter is in answer to your question asking:

"Does the county collector of a third-class county whose classification is changed to second-class become a salaried officer pursuant to 52.420 RSMo, or does he remain under the compensation schedule in effect (52.260 RSMo) when he took office?"

You refer to the change in classification of Cole County which occurred in 1973. The term of the collector expired on the first Monday in March. Section 52.015, RSMo; Opinion No. 113, February 28, 1963 to Zeilmann, copy enclosed.

In our Opinion No. 72, January 27, 1955 to Pratt, copy enclosed, we concluded that the annual compensation of a county assessor in a third class county was to be computed on a fee basis until the commencement of the next year of the assessor's incumbency after the effective date when the county's classification changes from third class to second class. Likewise, in our Opinion No. 382, November 2, 1962 to Holman, copy enclosed, we concluded that officials' salary or fee changes resulting from a transition from fourth class county to third class county became effective on the date corresponding to the beginning of the term of such officials.

Honorable James F. McHenry

It is our view that these opinions are applicable to the question you ask. Consequently, the collector in such a situation became a salaried officer on the commencement of his next year of incumbency after the effective date when the county changed classification.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John Ashcroft", with a long horizontal flourish extending to the right.

JOHN ASHCROFT
Attorney General

Enclosures:

Op.No. 113, 2-28-63, Zeilmann
Op.No. 72, 1-27-55, Pratt
Op.No. 382, 11-2-62, Holman

Attorney General of Missouri

JEFFERSON CITY

JOHN ASHCROFT
ATTORNEY GENERAL

(314) 751-3321

65101

November 22, 1978

OPINION LETTER NO. 200
Answer by Letter - Klaffenbach

Honorable Robert L. Dunning
State Representative, 117th District
Route 3
Clinton, Missouri 64735



Dear Mr. Dunning:

This letter is in response to your opinion request asking:

"Whether or not the Mayor of a Fourth Class City has the power to fill a vacancy in the office of Alderman where the vacancy occurred within six months preceding a general municipal election and where the City has no ordinance prescribing the manner in which the vacancy in the office of an Alderman should be filled."

You also state:

"The City of Lincoln, Missouri, is a Fourth Class City with a Mayor and four aldermen. Because of resignation there is a vacancy in the office of all four aldermen. That vacancy occurred within six months of the next general election and the City has no ordinance prescribing the manner in which a successor shall be appointed or elected."

Honorable Robert L. Dunning

Section 79.280, as amended by House Bill No. 971, Second Regular Session, 79th General Assembly, provides:

"If a vacancy occur in any elective office, the mayor or the person exercising the duties of the mayor shall cause a special election to be held to fill such vacancy; provided, that when any such vacancy occurs within six months of a municipal election, no election shall be called to fill such vacancy, but the same shall be filled by the mayor or the person exercising the duties of the mayor by appointment; provided further, that any vacancy in the office of alderman which may occur within said six months preceding a municipal election shall be filled in such manner as may be prescribed by ordinance. If a vacancy occur in any office not elective, the mayor shall appoint a suitable person to discharge the duties of such office until the first regular meeting of the board of aldermen thereafter, at which time such vacancy shall be permanently filled."

It is our view that under the provisions of the above quoted section if such a city does not have an ordinance providing how a vacancy in the office of alderman shall be filled when such vacancy occurs within six months preceding a municipal election, such a vacancy is to be filled by the mayor by appointment.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John Ashcroft", with a stylized, flowing script.

JOHN ASHCROFT
Attorney General

C. B. Burns

Attorney General of Missouri

JOHN ASHCROFT
ATTORNEY GENERAL

JEFFERSON CITY
65101

(314) 751-3321

April 11, 1978

Honorable Kenneth J. Rothman
Speaker of the House
Room 308, State Capitol Building
Jefferson City, Missouri 65101



Dear Speaker Rothman:

Since the beginning of this session, this office has received several inquiries concerning proposed legislation involving the transfer of state property to private not-for-profit organization. By law, this office is required to approve the instrument of conveyance.

The legislation generally contains language concerning the consideration for such conveyance. Some of the language has referred to a consideration of "one dollar and other good and valuable consideration."

In light of Article III, Section 38a, Missouri Constitution, this office has raised questions concerning such conveyances which reflect on their face inadequate consideration. This office cannot approve such conveyances. A few legislators have questioned the propriety of my position. However, my view is simply that if the consideration is inadequate it violates the constitutional provisions and I cannot in good conscience approve the same.

What is adequate consideration? A myth appears to be building in the legislature that the consideration must be five hundred dollars for such conveyances. This is simply not true. The consideration must reflect on the face of the instrument of conveyance the real value of the property. In one case it happened

Honorable Kenneth J. Rothman

to be five hundred dollars. However, this amount should not be used as a guideline. Further, the stated consideration must be collected and deposited to general revenue.

It should be noted that I am only referring to private not-for-profit corporations and not to municipalities. State property can be conveyed, by appropriate legislation, to a municipality without consideration.

I will work with members of the House and Senate in resolving any difficulties they may have with language which they propose for bills in connection with the conveyance of state property.

I am sending copies of this letter to Legislative Research and to each legislator.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John Ashcroft", with a stylized flourish at the end.

JOHN ASHCROFT
Attorney General

cc: Legislative Research
All Senators and Representatives

December 20, 1978

OPINION LETTER NO. 203

Honorable Michael J. Lybyer
State Representative, District 151
Huggins, Missouri 65484

FILED

203

Dear Representative Lybyer:

This letter is in response to your request for an opinion of this office asking whether the provisions of Section 50.660, RSMo, relating to the advertising for bids for county purchases, is applicable to purchases by county hospitals and county health centers.

Section 50.660 is quite extensive and we will not quote it here. It provides that advertisement for bids shall be required for certain county purchases.

We assume that you are referring to county hospitals established and organized under Sections 205.160 to 205.340, RSMo and not to county hospitals under Section 205.350, RSMo. The county health centers to which you refer are established under the provisions of Sections 205.010 to 205.155, RSMo.

In our Opinion No. 290-1972, copy enclosed, this office concluded that under the provisions of Section 205.250, RSMo, quoted therein, a county hospital organized under such provisions must advertise for new bids in order to build additional floors on a hospital building under construction and that it could not let the work to be contracted on the site by a change order to the existing contract. In that opinion we noted that other provisions for contracts and bids for public buildings were to be

Honorable Michael J. Lybyer

found in Sections 50.660 and 49.420, RSMo. However, the reference to those sections in that particular context was made because of the peculiar provisions of Section 205.250, which require that bids be advertised according to the law with respect to other county public buildings for the construction of such hospital buildings. Other provisions which are comparable to those contained in Section 205.250 are found in Section 205.080, RSMo of the health center law. Notably, there is no express provision in either the health center law or the county hospital law which requires that such trustees advertise for bids in any situation other than the construction of buildings as provided in Sections 205.250 and 205.080.

In the case of Layne-Western Co. v. Buchanan County, Mo., 85 F.2d 343 (1936), the United States Court of Appeals for the 8th Circuit concluded that a county planning and recreation commission, which was appointed by the county court and was without power to act except with the approval of the county court, came under the provisions of Section 50.660. While it is arguable that the holding in such case could apply to purchases by the trustees of the health center or the county hospital we are of the view that such holding is not applicable. County health center trustees and county hospital trustees clearly have powers which make them much more autonomous than the commission under consideration in the Buchanan County case. In this respect see State ex rel. Holman v. Trimble, 293 S.W. 98 (Mo. Banc 1927), in which the Missouri Supreme Court concluded that it was the duty of the county court to issue warrants on vouchers of the boards of trustees of the county hospital since such an act was purely ministerial in light of the authority of such trustees to control the expenditures credited to the hospital fund.

We find no statutory or case law to support the proposition that the county health centers or such county hospitals would be required to advertise for bids except as provided in Sections 205.080 and 205.250, RSMo. In light of the powers granted such trustees and in light of the nature of such governmental units, we feel required to conclude that there is no clear indication that the legislature intended such units to come under the provisions of Section 50.660.

Very truly yours,

JOHN ASHCROFT
Attorney General

Enclosure:
Op. No. 290-1972